A DIGEST OF ENGLISH CIVIL LAW.

EDITOR:
EDWARD JENKS.

BOOK V.

SUCCESSION (CONCLUDED)

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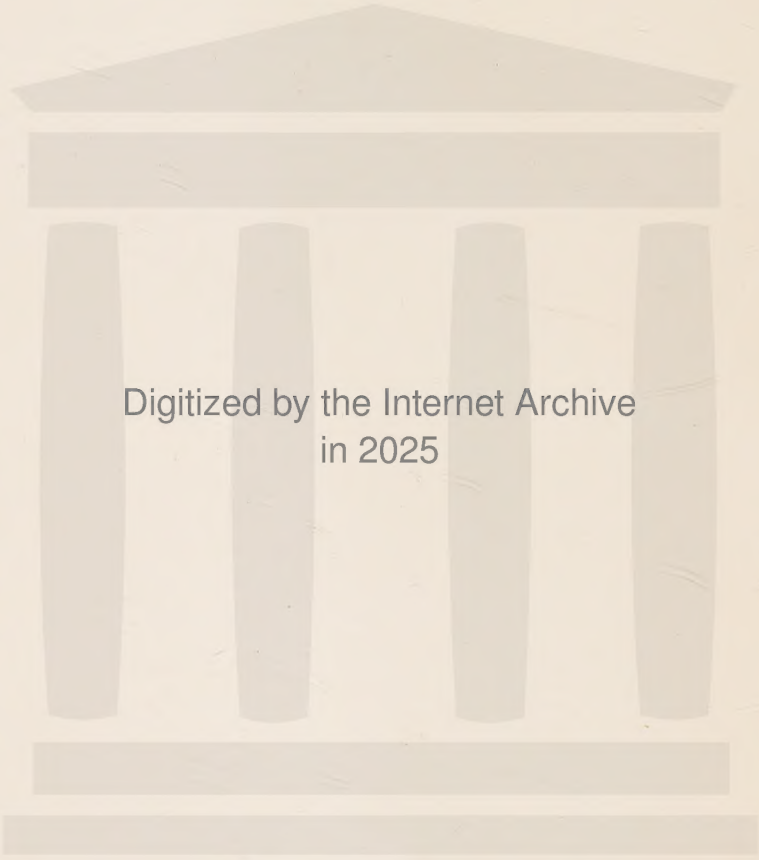
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A DIGEST

OF

ENGLISH CIVIL LAW

BY

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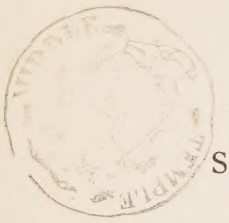

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EDITOR'S PREFACE

IT is, naturally, no small satisfaction to the editor and his colleagues, that they have been able, despite the unprecedented difficulties of the time, not only to finish a task the magnitude of which can only be appreciated by the expert, but to finish it sooner than at one time seemed possible.

For if, at first sight, a period of thirteen years may appear excessive for the production, even by a group of authors separated by a considerable distance and burdened with other tasks, of a work covering in all less than fifteen hundred pages, a little reflection will show that this criticism can hardly stand the test of examination. A Digest, it is true, does not, like a Code, profess to provide for every conceivable case; and its authors are, therefore, spared the many difficult problems of ethics and imagination which confront the legislator. On the other hand, no statement in a Digest ought to be made without full consideration of all the authorities; and any one acquainted, however superficially, with the vast mass of statutes and decisions which make up the raw materials of English Civil Law, will realize that the tasks of selection, examination, comparison, and reconciliation, which confront a conscientious attempt to state the net result in a compact and logical form, are hardly less arduous than those of a codifier. Some idea of the magnitude of these tasks may be gathered from the fact, that not less than seven thousand decisions have been, after due consideration, quoted in support of the propositions in this work, whilst at least as many more have been examined and rejected as unnecessary or unimportant.

Once more it should be emphasized, that no part of the work represents merely the effort of a single mind, however careful. It is true that the contents of each part have been, in the first instance, drafted by the author whose name appears against it in the Scheme of the Work. But that draft has been subjected to the severest, though most friendly, criticism of the other authors, severally and jointly; and not a line, hardly a word, has been passed for publication until it has satisfied, on two separate occasions, the critical sense of at least the majority of the authors. From this claim something must, of course, be abated in this and the preceding volume, produced since the outbreak of war; and this final volume, in particular, has been left mainly to the care of the author and the editor. To compensate, however, for this abatement of criticism, Dr. Holdsworth and the editor have passed the contents of this volume three times, instead of the normal twice, through the fire of a joint session.

This is, perhaps, hardly the occasion for insisting upon the importance of the task now brought to a conclusion. But it may be pointed out that, substantially speaking, the modern world acknowledges only two great original systems of law, the Roman and the English. The former started with immeasurable advantages. Thrown into an imperishable form by the genius of the ministers of Justinian, bequeathed to a barbaric world by an Empire whose traditions imposed respect even upon the vigorous nations which had overthrown it, favoured, at least at first, by an autocratic church and an autocratic monarchy which found in its absolutist doctrines a strong buttress of their own claims, it is little wonder that for many centuries Roman Law was deemed in Europe the only system worthy of a civilized country. The fact that English Law, in its native

land, for centuries resisted the attack of such a mighty rival, is no small testimony to the toughness of the national fibre and the popularity of the native system. The additional fact that, within the last two centuries, English Law has, not by force of arms but by willing adoption, become a system of world-wide influence, at least suggests that it has intrinsic merits, apart from its native popularity. It is by some faint hope of making these merits more widely known, that the authors have been sustained in their long task.

One word may perhaps be said as to the form of the work. Hitherto, institutional efforts have assumed the character of text-books; and in the hands of men of genius like Gaius, like Bracton, or like Blackstone, the merits of such a form can hardly be questioned. It combines the authority of a statute with the ease and lucidity of a great judgment and the charm of a literary exposition. But in less skilled hands, especially when the task is one of co-operation, it is apt to fail precisely in these qualities; and so the authors of this work have adopted the humbler but safer method of the draftsman, who endeavours to express the exact sense and object of his materials in the fewest possible words, without argument or criticism. In so doing, they have had in view the hope that their labours might result in showing, not what English Civil Law might or should have been, but what it actually is.

The readers of these lines will not, it is hoped, deem it an unwarranted intrusion of his private feelings upon their notice, if the editor ventures to place on record the debt of gratitude which he owes to those whose co-operation has enabled him to realize a plan which at one time looked almost hopeless. To the subscribers to the work, he owes gratitude for the endless patience and sympathy which have

lasted through the long process of publication. To his secretary, Mr. A. D. Bowers, upon whom has fallen the heavy burden of preparing the work for the press, he is greatly indebted for the fidelity and accuracy which are conspicuous in its mechanical details. To the publishers, he is indebted for a patience no less marked, and for a liberality and courtesy which have made his long task a pleasure. To his colleagues, he owes an incalculable and unrepayable debt, for the hospitality, the forbearance, the perseverance, and the learning, which have not merely given to the work whatever merit it displays, but have made of it a monument of unbroken friendship.

September, 1916

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Watling *v.* Lewis [1911] 1 Ch. 414; 80 L. J. (Ch.) 242; 104 L. T. 132 1415
Watson, *Re* (1886) 18 Q. B. D. 116; 56 L. J. (Q. B.) 78; 35 W. R. 290; (1887) 19 Q. B. D. 234; 56 L. J. (Q. B.) 619; 57 L. T. 215; 35 W. R. 709 1347, 1348
Watts *v.* Ball (1708) 1 P. Wms. 108; 2 Eq. Cas. Abr. 727; cited 2 Vern. 681 1313
Webb *v.* De Beauvoisin (1862) 31 Beav. 573 1391
Webb *v.* Needham (1823) 1 Add. 494 1337
Webster *v.* Webster (1804) 10 Ves. 93; 7 R. R. 351 1344
West of England Bank, *Re* (1879) 12 Ch. D. 823; 48 L. J. (Ch.) 604; 41 L. T. 27; 27 W. R. 869 1388
Wetdrill *v.* Wright (1814) 2 Phill. 243 1340
Whale *v.* Booth (1785) 4 T. R. 625 n.; 4 Dougl. 36 r.; 2 R. R. 483 n. 1406
Whaley, *Re* [1908] 1 Ch. 615; 77 L. J. (Ch.) 367; 98 L. T. 556 1356
Whitaker, *Re* [1901] 1 Ch. 9; 70 L. J. (Ch.) 6; 83 L. T. 449; 49 W. R. 106; 17 T. L. R. 24 1388, 1389
Whitehall *v.* Squire (1691) 1 Salk. 295 1347
Whitehead *v.* Palmer [1908] 1 K. B. 151; 77 L. J. (K. B.) 60; 97 L. T. 909; 24 T. L. R. 41 1341, 1366
Wilkinson *v.* Gibson (1867) L. R. 4 Eq. 162; 36 L. J. (Ch.) 646; 16 L. T. 733; 15 W. R. 983 1316
Wilks *v.* Groom (1856) 3 Drew. 584; 25 L. J. (Ch.) 724; 2 Jur. (N. S.) 681; 4 W. R. 697 1404
Williams, *Re* [1904] 1 Ch. 52; 73 L. J. (Ch.) 82; 89 L. T. 580; 50 W. R. 318; 20 T. L. R. 54 1373, 1379, 1380
Williams *v.* Arkle (1875) L. R. 7 H. L. 606; 45 L. J. (Ch.) 590; 33 L. T. 187; 24 W. R. 215 1305
Williams *v.* Thomas [1909] 1 Ch. 713; 78 L. J. (Ch.) 473; 100 L. T. 630 1320

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Williams *v.* Williams (1882) 20 Ch. D. 659; 51 L. J. (Ch.) 385; 46 L. T. 275; 46 J. P. 726; 30 W. R. 438; 15 Cox. C. C. 39 1402

Williams *v.* Williams [1900] 1 Ch. 152; 69 L. J. (Ch.) 77; 81 L. T. 804; 48 W. R. 245 1393

Williams' Estate, *Re* (1872) L. R. 15 Eq. 270; 42 L. J. (Ch.) 158; 28 L. T. 17 1376

Willis *v.* Willis (1865) 34 Beav. 340; 34 L. J. (Ch.) 313; 13 W. R. 77 1324

Wilson, *Re* [1916] 1 Ch. 220; 85 L. J. Ch. 254; 114 L. T. 390; 32 L. T. R. 150; 60 Sol. Jo. 190 1320

Wilson *v.* Hodson (1872) L. R. 7 Exch. 84; 41 L. J. (Ex.) 49; 20 W. R. 438 1345

Wilson *v.* Wilson [1911] 1 K. B. 327; 80 L. J. (K. B.) 296; 104 L. T. 96; 18 Manson, 18 1380

Wollaston *v.* Hakewill (1841) 3 Man. & Gr. 297; 10 L. J. (C. P.) 303; 3 Scott. (N. R.) 593 1366

Woodin, *Re* [1895] 2 Ch. 309; 64 L. J. (Ch.) 501; 72 L. T. 740; 43 W. R. 615; 12 R. 302. C. A. 1413

Woodward *v.* Dowse (1861) 10 C. B. (N. S.) 722; 31 L. J. (C. P.) 70; 8 Jur. (N. S.) 413; 9 W. R. 870 1324

Woolley *v.* Clark (1822) 5 B. & Ald. 744; 1 D. & R. 409; 24 R. R. 546 1346, 1347, 1350

Wright, *In the Goods of* [1893] P. 21; 62 L. J. (P.) 31; 68 L. T. 25; 41 W. R. 318; 1. R. 476 1341

ERRATA AND CORRIGENDA IN PRECEDING VOLUMES

BOOK I

Page 7, line 21. Substitute for addition made in last ERRATA: "A corporation which is domiciled in England may also become foreign, and even hostile, if it is *de facto* controlled by alien enemies (*Daimler* v. *Continental Tyre Co.* [1916] 2 A. C. 307)."

Page 30, line 6. Add to note: "A married woman may assign her right to be indemnified against a liability, even though she has no separate property against which the liability can be enforced (*British Union* v. *Rawson* [1916] 2 Ch. 477)."

BOOK II, PART I

Page 105, § 234. Add note: "[When an executory contract for work and labour for a lump sum has been substantially but not completely performed, the party performing is entitled to recover the price with an abatement for the deficiency (*Dakin* v. *Lee* [1916] 1 K. B. 566).]"

Page 141, § 323. Add note: "[Even a contractual right to an indemnity may be assigned (*British Union* v. *Rawson* [1916] 2 Ch. 477).]"

BOOK II, PART III

Page 349, line 6. Add to note: "But the rule does not prevent a wife suing her husband to set aside a deed alleged to have been obtained by fraud (*Hulton* v. *Hulton* [1916] 2 K. B. 642)."

Page 512, § 1008 (iii). Add further to note: "and to statements made by a person who may or may not be a witness in contemplated proceedings (*Beresford* v. *White* [1914] XXX T. L. R. 591).]"

BOOK III

Page 656, § 1175, note (c). Add: '[This statement has now been rendered doubtful by *Re Stanley's Settlement* [1916] 2 Ch. 50.]'

Page 657, § 1176, note (b). Add: 'But see *Re Stanley's Settlement*, *ubi sup.*'

Page 663, § 1182. Insert at beginning of par.: 'A legal remainder which is not ready to take effect in possession on the expiry of the preceding estate cannot (save as hereinafter mentioned) take effect at all. But' And add note to par.: ['It has recently been decided that, in the case of a devise of a socage remainder, which, by the Land Transfer Act, 1897, vests in the testator's personal representative on his death, is not a legal remainder for the purposes of the common law rule above stated; even though the personal representative has assented to the devise before the death of the tenant for life (*Re Robson* [1916] 1 Ch. 116).']

Page 754, § 1309. Add to note: 'But in *Re Monckton's Settlement* [1913] 1 Ch. 634, Sargent, J., held that this doctrine only applied to limitations of beneficial interests.'

Page 808, § 1386. Add as note: ['Even where there is no conveyance in writing, the doctrine of part performance (*ante*, Bk. II, Pt. I, Sect. I, Tit. II, § 221) may entitle the party who can plead it to a legal conveyance (*Lester* v. *Foxcroft* (1700) Colles, 108, followed in many cases).']

Page 815, § 1398. Add note: ['A mortgage may become irredeemable by the mortgagor if he makes a subsequent mortgage without disclosing the earlier (4 W. & M. (1692) c. 16, s. 3).']

Page 852, § 1443. Add note: ['No fixed period is necessary in proof of abandonment (*R.* v. *Chorley* (1848) 12 Q. B. 515).]

Page 853, § 1444. Add final note: "[The enjoyment must be open, notorious, and as of right (*Lyell* v. *Lord Hothfield* [1914] 3 K. B. 911).]"

Page 863, line 28. For "execution" substitute "registration," and for "abolished" substitute "modified."

Page 888, § 1485. Add new sub-par.

"(d) in raising money for payment of costs, charges and expenses.

S. L. A. 1882, s. 47.

[This power can only be exercised under the direction of the Court.]"

Page 941, § 1558. Add to note: 'But, apparently, subject to this qualification, a mere *spes successionis* may now be assigned (*Re Lind* [1915] 2 Ch. 345).'

Page 1017, § 1659. Insert side note: "*Licenses.*"

Page 1066, § 1722. In note (a), for "1883, s. 4 (1) (B)," read: "1914, s. 1 (*b*)."

In note (b), for "1883, ss. 43, 44," read: "1914, ss. 37, 38."

In note (c), for "49," read "45."

Page 1067, § 1723. In note (a), for "1883, s. 48," read: "1914, s. 44."

Page 1068, § 1724. In note (f), for "1883, s. 47 (1)," read: "1914, s. 42 (1)."

Page 1069, § 1725. In note (a), for "1883, s. 47 (3)," read: "1914, s. 42 (4)."

In note (d), for "1883, s. 47 (1)," read: "1914, s. 42 (1)."

Page 1069, § 1726. In note strike out "and Deeds of Arrangement," and for "1913, s. 13," read: "1914, s. 42 (2)."

Page 1070, § 1727, n. For "47 (1)," read: "42 (1)."

Page 1126, § 1797. Insert as sub-par. (iii).

"(iii) Where any property vested in trustees by way of security becomes irredeemable, they hold it on trust for sale, with power to postpone the sale;

(f) *Ibid.*, s. 9."

and renumber sub-pars. and notes accordingly.

Page 1143, § 1820. Add to note: "and it does not apply where the purchaser of the trustee's beneficial interest is entitled to assume that the trust is at an end (*Pearce* v. *Bulteel* (1916) 85 L. J. (Ch.) 677).]"

BOOK IV

Page 1201, § 1891. Add to note: "Alimony is not enforceable by action during the husband's lifetime, but by attachment under s. 5 of the Debtors Act, 1869 (*Linton* v. *Linton* (1885) 15 Q. B. D. 239). But arrears, not exceeding one year's, may be enforced by action against his representatives (*Re Stillwell* [1916] 1 Ch. 365).]"

Page 1212, line 24. After "bound," insert: "(subject to § 1906, *ante*)."

Page 1217, § 1917. Add to note: "But this does not render invalid a provision in a settlement by a third party that maintenance shall not be allowed to an infant while he is in the custody or control of his father (*Re Barwick's Settlement* [1916] 2 Ch. 304).]"

BOOK V

Page 1244, § 1965. Insert at commencement of note to §: "'Soldier' includes a female nurse who has received orders to join a hospital ship under military control (*Re Stanley* [1916] P. 192).]"

Page 1252, line 12. For "1 P. & D.," read "1 P. D."

Page 1259, line 22. Add at conclusion of §: "unless the testament did not require attestation (c)."

(c) *Re Limond* [1915] 2 Ch. 240."

BOOK V

SUCCESSION *(continued)*

SECTION II

INTESTATE SUCCESSION

TITLE I—GENERAL

Different classes of successors

2047. Subject to Sect. III, Tit. II, and to the claims of his creditors, all the property belonging to a deceased person in his own right which has not been effectively disposed of by his testament (if any), and which is not extinguished by his death, passes by the rules of intestate succession to his heirs,[a] next of kin,[b] or husband or wife respectively.[c] In so far as there is a failure of such persons, it passes (being real estate) by escheat, or (being personal estate) as *bona vacantia*.[d]

(a) *Post*, Title II.
(b) *Post*, Title III.
(c) *Post*, Title IV.
(d) *Post*, Title V.

[This Section deals exclusively with property which belonged to the deceased in his own right. Property belonging to him in a fiduciary or representative capacity passes according to the rules stated in the Sections dealing with such capacity.]

Succession by person causing death

2048. It is doubtful whether the rule that a person proved to have caused the death of a testator by an act which is a criminal offence cannot claim any benefit under the testament (*ante*, Sect. I, Tit. IV, § 2019) is applicable also to intestate succession.

Re Houghton [1915] 2 Ch. 173.

Title of beneficiary

2049. Where a beneficiary takes property of a deceased person as heir or next of kin through the personal representative of the deceased (*post*, Sect. III, Tit. II), he cannot require a conveyance or payment by the representative until the expiry of a year from the decease (*post*, Tit. II, § 2060).

Statute of Distribution (1670) s. 8.
Land Transfer Act, 1897, s. 3 (2).
Cooper v. *Cooper* (1874) L. R. 7 H. L., at p. 65, *per* Lord Cairns, C.

TITLE II—INHERITANCE OF REAL ESTATE

Common law and local custom

2050. The undisposed of real estate (*ante*, Bk. I, Sect. II, § 37) to which a deceased person was solely and beneficially entitled at his decease passes (subject to Title IV, *post*, and to payment of his debts) according to the rules of inheritance either of the common law (as amended by statute) or of the local custom.[a] Generally speaking, all socage interests of inheritance pass according to the rules of the common law [b] (as amended by statute), and all copyhold and customary interests of inheritance according to the rule of the local custom.[c] But socage interests may (as respects the inheritance thereof) be governed by the rules of local custom.[d] Whether they are so governed, is a question of fact for the jury; but there is a presumption that all socage interests in Kent are subject to the custom of gavelkind.[e]

(a) Inheritance Act, 1833, s. 1.
Administration of Estates Act, 1833.
Re Hughes [1916] 1 Ch. 493.

[The interest of a joint tenant passes on his death to the other joint tenants or tenant, not to his heir (*ante*, Bk. III, Sect. VI, Tit. II, § 1753).]

(b) These rules extend not only to estates in the technical sense, but to possibilities, rights, titles, and other minor interests, legal or equitable (Inheritance Act, 1833, s. 1).

(c) But where the custom is silent, copyholds descend according to common law rules (*Denn* v. *Spray* (1786) 1 T. R., at p. 474, *per* Ashurst, J.).

(d) The most common of these variations is that of gavelkind, by which estates of inheritance descend equally to all males in the same degree (Litt., s. 210).

(e) Litt., s. 210.
Re Chenoweth [1902] 2 Ch. 488.

['Real estate,' for the purposes of this Title, includes not only real estate in the ordinary meaning of the term (*ante*, Bk. I, Sect. II, § 37) but also personal property which, by reason of the equitable doctrine of Conversion (*post*, Sect. III, Tit. III, §§ 2134–2140), is deemed for such purposes to be real estate (Inheritance Act, 1833, s. 1).]

Bastard cannot inherit

2051. No person can inherit real estate in England unless he was born in lawful wedlock;[a] nor can any one, except his lawful issue, inherit real estate from a person not so born.[b]

(a) *Doe* v. *Vardill* (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

[The result of this rule is, that a person born out of wedlock, though he may be legitimated for most purposes by the subsequent marriage of his parents (*Re Goodman's Trusts* (1881) 17 Ch. D. 266), cannot inherit English real estate, except from his own legitimate issue.]

(b) *Re Don* (1857) 4 Drew. 194.

[Probably the rule in the text does not apply to succession to leaseholds (Dicey, *Conflict of Laws* (2nd ed.), at p. 487).]

Descent traced first from 'purchaser'

2052. Subject to Bk. III, Sect. XVI, Tit. IV, § 1764, *ante* (co-parcenary), descent is in all cases traced in the first instance from the purchaser,[a] i. e. from the person who last acquired the estate otherwise than by descent, or by any escheat, partition, or enclosure, by the effect of which the estate became

part of, or descendible in the same manner as, other real estate acquired by descent.(b) But if there is a total failure of the heirs of the purchaser, or if any real estate is descendible as if an ancestor had been the purchaser thereof and there is a total failure of the heirs of such ancestor, descent is then traced from the person last entitled to the estate, as if he had been the purchaser.(c)

(a) Inheritance Act, 1833, s. 2.

[In the language of the common law, 'descent' included inheritance by collaterals, as well as by issue; and the Inheritance Act extended the scope of the term to inheritance by ancestors.]

(b) *Ibid.*, s. 1.

[The rule applies to copyholds and other customary tenures as well as to socage (*Muggleton* v. *Barnett* (1857) 2 H. & N. 653).]

(c) Law of Property Amendment Act, 1859, s. 19.

[An obvious effect of this enactment is to enable a woman to inherit real estate from her issue, though they have inherited it from her husband. She could not, of course, inherit directly from her husband as such.]

Presumption of purchase

2053. It is a presumption of law that, for the purpose of tracing descent, any person entitled to the estate was a purchaser, until it is proved that he acquired it by inheritance.

Inheritance Act, 1833, s. 2.

Double title

2054. A devise to the testator's heir, and an assurance to the assuror or his heirs, if taking effect after

1833, constitute the testator's heir or the assuror respectively a purchaser for the purposes of § 2052; and a limitation to the heirs or heirs of the body of any person, made after 1833, constitutes that person a purchaser for similar purposes.

Inheritance Act, 1833, ss. 3, 4.

[It is not uncommon, in a strict settlement of real estate, for the ultimate limitation to be in favour of the settlor's 'right heirs'; and, if no such ultimate limitation is expressed, and there is an undisposed of interest, it will result to the settlor. In either of these events, the descent is 'broken'; and the settlor, though in fact he had inherited the estate, becomes a purchaser for the purposes of future descent.]

Descent to issue

2055. Socage interests of inheritance descend in the first instance to the issue of the purchaser *in infinitum;* the nearer degree excluding the remoter, except that the issue of any deceased person represent their ancestor *in infinitum.*

Co. Litt. 10 b.
Bl. *Comm.* II, 217.

But: —

(i) male issue exclude female in the same degree; and

Co. Litt. 10 b.
Hale, *History of the Common Law* (ed. 1794), II, 116.

(ii) among males in the same degree, the elder excludes the younger, though females in the same degree inherit equally as coparceners.

Litt. s. 5.
Co. Litt. 14 a.
Hale, *op. cit.*, II, 119.

2056. In the descent of an estate in tail male (*ante*, Bk. III, Sect. I, Tit. III, § 1054) all females and their issue are excluded; and in the descent of an estate in tail female (*ibid.*) all males and their issue are excluded. *Descent of estates tail*

Litt. ss. 23, 24.
Co. Litt. 24 b, 25.

[Of course, estates tail can only descend to the issue of the donee (purchaser), not to his ancestors or collaterals (see Bk. III, Sect. I, Tit. III, § 1054).]

2057. On failure of the issue of the purchaser, a socage interest in fee simple descends to the nearest lineal ancestor of the purchaser and his issue *in infinitum*, according to the rules laid down in § 2055, *ante*.[a] But all paternal ancestors and their issue are preferred to all maternal ancestors and their issue; and, among paternal and maternal ancestors respectively, all male ancestors and their issue are preferred to all female ancestors and their issue,[b] while, among female ancestors, paternal or maternal, the mother of the more remote male ancestor, and her issue, are preferred to the mother of the less remote and her issue.[c] *Descent on failure of issue*

(a) Inheritance Act, 1833, s. 6.
(b) *Ibid.*, s. 7.
(c) *Ibid.*, s. 8.

[The rules laid down in the above §, which were introduced by the Inheritance Act of 1833, virtually abolish direct collateral inheritance altogether; collateral relatives inheriting only as representing the common ancestor. This principle is, indeed, expressly

enacted in the case of brothers and sisters (Inheritance Act, 1833, s. 5). Of course relatives by affinity (marriage) have no rights of inheritance.]

Descent to half blood

2058. Collateral relatives of the half blood to the purchaser may inherit under § 2057; but they inherit only next after relatives of the whole blood (male or female) in the same degree, and their issue.

Inheritance Act, 1833, s. 9.

[The application of this rule leads to different results, according to whether the common ancestor is a male or a female. Where the common ancestor is a male, the whole blood collaterals of the same degree as the half blood take after and as representing him, and the half blood collaterals rank next after them; where the common ancestor is a female, the whole blood collaterals come before her, as representing their deceased male ancestor, and the half blood represent, and therefore take after, her (*ibid.*). This is the explanation of the rule (apparently arbitrary) stated in s. 9 of the Inheritance Act, that "the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother."]

Extent of local custom

2059. The existence and extent of a local custom of inheritance contrary to the common law are questions of fact for the jury;[a] and proof of a local custom affecting descent in a nearer degree is no proof that a similar custom affects a remoter.[b]

(a) *Re Chenoweth* [1902] 2 Ch. 488.
(b) *Muggleton* v. *Barnett* (1857) 2 H. & N., at p. 661, *per* Crompton, J.

[But gavelkind is not, at any rate in Kent, a local custom contrary to the common law for this purpose (*Re Chenoweth*, *ubi sup.*).]

2060. The claim of the heir to a socage[a] fee simple interest[b] or an equitable fee simple in copyhold or customary lands[c] is subject to the estate or interest of the personal representative of the deceased in whom the estate becomes vested on his death for purposes of administration (*post*, Sect. III, Tit. II).[d] But, subject to the claims of the deceased's creditors, the personal representative may at any time after the decease, convey such interest to the person entitled as heir; and, if he fails to do so, the Court may, at the expiry of one year from the decease, on the application of the heir, order such a conveyance to be made.[e] *Rights of personal representative*

(a) Copyholds and customary freeholds which require conveyance to a purchaser by surrender and admittance do not pass to the personal representative of the deceased (Land Transfer Act, 1897, s. 1 (4)).
(b) It is assumed (though the Act is silent on the point) that estates tail do not pass to the personal representative of the deceased owner; because they are not assets for payment of his debts.
(c) *Somerville's and Turner's C.* [1903] 2 Ch. 583.
(d) Land Transfer Act, 1897, s. 1 (1).

[Apparently even the special occupant of an estate *pur autre vie* claims through the personal representative by virtue of the Land Transfer Act, 1897, s. 1 (*post*, Sect. III, Tit. III, § 2126).]

(e) *Ibid.*, s. 3 (2).

2061. For the purposes of this Title, an estate *pur autre vie* is real estate if, on the decease of the tenant, it stands limited to his heirs or the heirs of his body, and the tenant dies leaving an heir of the class de- *Special occupant*

scribed in the limitation (*ante*, Bk. III, Sect. I, Tit. IV, § 1082).

Wills Act, 1837, s. 6.
Philpotts v. *James* (1784) 3 Doug. 425.
Re Michell [1892] 2 Ch. 87.
E. of Mount-Cashell v. *More-Smyth* [1896] A. C. 158.

[The question whether an estate *pur autre vie* stands limited to the heirs of the tenant is settled by the terms of the conveyance to him, and not by the terms of the original creation (*E. of Mount-Cashell* v. *More-Smyth*, *ubi sup.*, at p. 161, *per* Lord Davey). But, of course, where that conveyance is a testament, the rule prevails that technical words are not necessary (*Re Sheppard* [1897] 2 Ch., at p. 69, *per* Romer, J.); though there must be some evidence in the language of the testament to show that the testator intended the estate to pass as real estate (*Re Inman* [1903] 1 Ch. 241).]

Deaths before 1834

2062. The rules laid down in this Title do not govern descent arising on deaths which took place before 1st January, 1834;[a] and a limitation in an assurance which took effect before that date to the heir or heirs of any person by way of purchase, will be construed in accordance with the law as it stood at the passing of the Inheritance Act, 1833.[b]

(a) Inheritance Act, 1833, s. 11.
(b) *Ibid.*, s. 12

[Before the passing of the Inheritance Act, a devise to the testator's heir was inoperative; and the heir took by descent, not by purchase.]

TITLE III — SUCCESSION TO PERSONAL ESTATE

Statutes of Distribution

2063. Subject to § 2065, *post*, and to Tit. IV, the undisposed of personal estate (*ante*, Bk. I, Sect. II, § 38) of a deceased person passes (after payment of his debts) to his or her next of kin, according to the rules laid down by the Statutes of Distribution.[a] For this purpose, personal estate not expressly disposed of by a testament is, though vested in executors, regarded as undisposed of; unless the testament contains an indication that the executors are to hold it beneficially.[b]

(a) Statute of Distribution (1670).
1 Jac. II (1685), c. 17. (Apparently there is no official short title for this Act.)
Re Hughes [1916] 1 Ch., at p. 500, *per* Younger, J.

[Local customs governing the distribution of personal estate on intestacy were abolished by the Act for the Uniform Administration of Intestates' Estates, 1856, which, though repealed by the Statute Law Revision Act, 1892, has not lost its effect for the purpose. There are certain statutory provisions by which the naval and military authorities, and the Board of Trade, may dispose in special ways of the effects of deceased sailors, soldiers, and merchant seamen respectively; but these are not of sufficient general interest to warrant detailed statement.]

(b) Executors Act, 1830.

[If the property is bequeathed to the executors, this Act does not apply; and the Court must decide, upon the construction of the will, whether the executors were intended to take beneficially, or not (*Williams* v. *Arkle* (1875) L. R. 7 H. L. 606).]

Domicile

2064. The devolution of the personal estate of a deceased intestate, in so far as it is governed by the law of succession,[a] is governed by the law of succession of the deceased's domicile at the time of his decease[b] (*ante*, Bk. I, Tit. I, §§ 4–11).

(a) *Re Barnett's Trusts* [1902] 1 Ch. 847.
(b) *Re Goodman's Trusts* (1881) 17 Ch. D. 266.
Re Aganoor's Trusts (1895) 64 L. J. Ch. 521.

[A change in the law of the deceased's domicile made subsequently to his decease, will not, therefore, affect the rights of his successors (*Re Aganoor*, *ubi sup.*).]

Rules of distribution

2065. If the deceased leaves a widow and children, the widow takes one third of his undisposed of personal estate, and the children (subject to §§ 2066 and 2067) two thirds equally between them.[a] If the deceased leaves a widow but no children, the widow (subject to Tit. IV, § 2079, *post*) takes one moiety of his personal estate.[b] If he leaves children but no widow, the children (subject to §§ 2066 and 2070) take the whole of his personal estate equally between them.[c] If the deceased leaves no widow or children, or, if he leaves a widow, in so far as the claims of the widow do not extend, the undisposed of personal estate of the deceased is (subject to §§ 2066–2068) divided equally amongst the persons in the nearest degree of kindred to the de-

ceased, however remote, living at the time of his decease, *per capita*.[d]

(a) Statute of Distribution (1670) s. 3.
(b) *Ibid.*, *ad fin.*
(c) *Ibid.*
(d) *Ibid.*

[It is a general rule that persons claiming under an intestacy in their own right take *per capita;* those claiming by right of representation, *per stirpes* (*Re Ross' Trusts* (1871) L. R. 13 Eq., at p. 293, *per* Wickens, V. C.).]

Representation of deceased kindred

2066. For the purposes of § 2065, issue of deceased children of the intestate represent their deceased ancestors *per stirpes;*[a] and, where there is any surviving brother or sister of the intestate, the children of a deceased brother or sister represent their parent *per stirpes*.[b] But, subject to these provisions, there is no representation of deceased kindred in distribution.[c]

(a) Statute of Distribution (1670) s. 3 (2).
Re Natt (1888) 37 Ch. D. 517.

[In this case the right of representation is not confined to the children of deceased children, but extends to the issue of deceased children indefinitely (*Carter* v. *Crawley* (1683) T. Raym., at p. 500, *per* Sir T. Raymond, J.; *Re Ross' Trusts* (1871) L. R. 13 Eq. 286). But the widows of deceased issue have no claim by intestacy on the estate of the intestate (*Price* v. *Strange* (1820) 6 Madd., at p. 162, *per* Leach, V. C.).]

(b) Statute of Distribution (1670) s. 4. (But not remoter issue (*Pett's Case* (1692) 1 P. Wms. 25; *Carter* v. *Crawley, ubi sup.*).)

[Thus nephews and nieces do not take as representing their deceased parents, unless a brother or sister of the intestate survives

him (*Walsh* v. *Walsh* (1695) Pre. Ch. 54; *Lloyd* v. *Tench* (1750) 2 Ves. Sen. 212).]

(c) Statute of Distribution (1670) s. 4.
Carter v. *Crawley, ubi sup.* (Opinion of Doctors' Commons).

Parental rights

2067. The father of the intestate excludes the mother entirely;[a] and, if the father of the intestate has predeceased him, the mother shares equally with the brothers and sisters of the deceased, and with the children (*per stirpes*) of such of them as have predeceased the intestate, if any.[b]

(a) *Blackborough* v. *Davis* (1701) 1 P. Wms., at p. 48, *per* Holt, C. J.

[Probably this rule was merely the consequence of the principle of the common law, which would at once have vested any personal estate acquired by the mother in her husband. But it would appear to have survived the Married Women's Property Acts.]

(b) 1 Jac. II (1685) c. 17, s. 7.

[The words of the statute appear to confer on the mother, the brothers and sisters, and the 'representatives' of brothers and sisters, of an intestate, a right to succeed if the intestate leaves no wife *or* children; but it has been decided that, though there is no wife, the section applies; but only if there are no issue of the intestate (*Keylway* v. *Keylway* (1726) 2 P. Wms. 344; *Stanley* v. *Stanley* (1739) 1 Atk. 455). But the word 'representatives' includes only the children of deceased brothers and sisters, not remoter issue (*Stanley* v. *Stanley, ubi sup.*, p. 457). Under s. 4 of the statute of 1670, children of deceased brothers and sisters can only take if a brother or sister of the intestate survives (*ante*, § 2066, n. (b)); but, under this statute, such children take, whether or not a brother or sister survives (*Stanley* v. *Stanley, ubi sup.*). Of course if the intestate leaves no issue and no brothers or sisters or children of brothers or sisters, the mother (subject to the claim of the widow, if any) takes all as next of kin (*Stanley* v. *Stanley, ubi sup.*, at p. 457, *per* Lord Hardwicke, C.).]

Mode of reckoning degrees of kindred

2068. For the purposes of § 2065, degrees of kindred are computed by reckoning up from the intes-

tate to the common ancestor, and from the common ancestor down to the claimant, and counting each step a degree.[a] But grandparents are postponed to brothers and sisters of the intestate.[b]

(a) *Mentney* v. *Petty* (1722) Pre. Ch. 593.
Thomas v. *Ketteriche* (1749) 1 Ves. Sen. 333.
Lloyd v. *Tench* (1750) 2 Ves. Sen., at p. 214, *per* Sir John Strange, M. R.

[This is the method of the Civil as distinct from the Canon Law.]

(b) *Evelyn* v. *Evelyn* (1754) 3 Atk. 762.

[*Semble*, a preference over grandparents is also given to nephews and nieces taking by representation under § 2066, *ante*. Relatives by affinity (marriage) are, of course, not kindred for the purposes of succession.]

No preference of age or sex

2069. In considering claims to intestate succession, no preference is given to age, nor (subject to § 2067) sex;[a] and collaterals of the half blood rank equally with collaterals of the whole blood in the same degree.[b]

(a) Statute of Distribution (1670), *passim*.
Blackborough v. *Davis* (1701) 1 P. Wms., at p. 50, *per* Holt, C. J.
Moor v. *Barham* (1723) *ibid.*, at p. 53.
(b) *Crooke* v. *Watt* (1690) 2 Vern. 124.
Burnet v. *Mann* (1748) 1 Ves. Sen., at p. 157, *per* Lord Hardwicke, C.
Jessopp v. *Watson* (1833) 1 Myl. & K. 665.

'Hotchpot'

2070. No child of the intestate to whom a portion (either in real estate or personal estate)[a] has been advanced by the intestate in his lifetime can claim

any share under the Statutes of Distribution in the personal estate of a father[b] dying wholly intestate,[c] without bringing such advancement into account for the benefit of the other children of the intestate, or their representatives;[d] and the same rule applies to the issue of such child claiming by representation the share of their deceased ancestor who has been so advanced.[e] But the rule has no application to an heir at law in respect of any land coming to him from the intestate by descent or otherwise;[f] and (*semble*) it does not apply to the children of deceased brothers and sisters of the intestate whose parents have received benefits from the intestate in his lifetime.[g]

(a) *Edwards* v. *Freeman* (1727) 2 P. Wms., at p. 440, *per* Jekyll, M. R.

[*Semble*, any land settled on a child (other than the heir at law) is a portion for this purpose (*Twisden* v. *Twisden* (1804) 9 Ves., at p. 425, *per* Lord Eldon, C.).]

(b) *Holt* v. *Frederick* (1726) 2 P. Wms. 356.
(c) *Vachell* v. *Jeffereys* (1701) Pre. Ch. 170.
Cowper v. *Scott* (1731) 3 P. Wms. 119.
Re Roby [1908] 1 Ch. 71.

[Therefore no provision made by the father's will need be brought into account (*Edwards* v. *Freeman*, *ubi sup.*, at p. 440, *per* Jekyll, M. R.).]

(d) Statute of Distribution (1670) s. 3.
(e) *Proud* v. *Turner* (1729) 2 P. Wms. 560.
(f) Statute of Distribution (1670) s. 3.

[The heir at law, if a child of the intestate, must account for personal estate advanced to him by his father (*Kirkcudbright* v. *Kirkcudbright* (1802) 8 Ves. 51).]

(g) *Re Gist* [1906] 1 Ch. 58; affd. 2 Ch. 280.

[In this case the children of a deceased sister were held not bound to account, even though the sums advanced to their parent were ad-

vanced under an order of the Court which expressly directed that the parent should do so. On the other hand, the sums were not advanced as 'portions,' with regard to the nature of which, see *ante*, Sect. I, Tit. IV, §§ 2027, 2028. The benefit of hotchpot goes only to the other children of the intestate or their representatives, not to the intestate's widow (*Kirkcudbright* v. *Kirkcudbright*, *ubi sup.*).]

What is 'intestacy'

2071. A person who leaves a testament which, though *primâ facie* regular, is wholly inoperative, is deemed to die wholly intestate for the purposes of § 2070;[a] but (*semble*) the fact that all the beneficial dispositions of a testament fail has not that effect, if the legal title to the testator's property is effectually disposed of by the testament.[b]

(a) *Re Ford* [1902] 2 Ch. 605.

[Here the will left everything to the testator's widow, appointing her sole executrix; and she died before the testator.]

(b) *Walton* v. *Walton* (1807) 14 Ves., at p. 324, *per* Grant, M. R.

Beneficiary must account

2072. The provisions of Sect. I, Tit. IV, § 2017, *ante*, apply to the case of a person entitled to a distributive share of the personal estate of an intestate.

Re Cordwell's Estate (1875) L. R. 20 Eq. 644.
Re Knapman (1880) 18 Ch. D. 300.

[To the authorities for § 2017 may now be added *Re Dacre* [1916] 1 Ch. 344.]

Beneficiary no direct title

2073. A person claiming by intestacy a share of the personal estate of a deceased person has no right to any specific chattel of the deceased.[a] But his

claim vests immediately on the intestate's decease;[b] and even a declaration in the deceased's testament that his next of kin shall not succeed to his undisposed of personal estate will not deprive such persons of their rights.[c]

(a) Statute of Distribution (1670) s. 5.
Cooper v. *Cooper* (1874) L. R. 7 H. L., at p. 65, *per* Lord Cairns, C.

[Presumably, the administrator has a legal right to insist on converting the whole estate into money against the wishes of the next of kin. *Quære:* Would the Court, in the exercise of its equitable jurisdiction, restrain an administrator from making an oppressive use of this right?]

(b) *Brown* v. *Shore* (1689) 1 Show. 25.
Brown v. *Farndell* (1690) Carth. 51.
Cooper v. *Cooper, ubi sup.*

[Consequently, if the next of kin dies after the intestate but before distribution of the estate, his rights pass to his representatives.]

(c) *Johnson* v. *Johnson* (1841) 4 Beav. 318.

[But, of course, where the evident intention of the testator in excluding some or one of his next of kin is to bequeath the property to the others, his intention will be followed (*Bund* v. *Green* (1879) 12 Ch. D. 819).]

General occupant

2074. For the purposes of this Title, an estate *pur autre vie* which is not limited to the heirs or the heirs of the body of the tenant devolves as personal estate.

Wills Act, 1837, s. 6.
E. of Mount-Cashell v. *More-Smyth* [1896] A. C. 158.
Re Sheppard [1897] 2 Ch. 67.

TITLE IV — SUCCESSION BETWEEN HUSBAND AND WIFE

Curtesy

2075. Subject to § 2078, *post*, a man is entitled, on the death of his wife, to a life interest in any real estate (legal or equitable)[a] held by common socage, to which his wife was solely and beneficially entitled at the time of her decease, for a present interest capable of passing by inheritance[b] to her issue by him; provided that (i) in fact such issue was born alive during the marriage,[c] and (ii) the husband had, so far as possible,[d] reduced the interest into possession before her death.[e]

(a) *Sweetapple* v. *Bindon* (1705) 2 Vern. 536.
Watts v. *Ball* (1708) 1 P. Wms. 108.
Casborne v. *Scarfe* (1737) 1 Atk. 603.

[The position of purely incorporeal hereditaments (*ante*, Bk. III, Sect. I, Tit. IX) is doubtful. Coke (Co. Litt. 29 a, 30 b) mentions advowsons, rents, and a right of common *sans nombre*, as subject to curtesy. Of course there can be no curtesy of an interest *in futuro* (*ibid.* 29 a); but a freehold estate subject only to a term of years is not an interest *in futuro* for this purpose (*ante*, Bk. III, Sect. I, Tit. VIII, § 1167, and Co. Litt. 29 b).]

(b) The estate must be strictly inheritable by the issue; and if they take by purchase under a limitation over on the death of the wife, there is no curtesy (*Sumner* v. *Partridge* (1740) 2 Atk. 47). *Semble*, therefore, there can be no curtesy of an estate *pur autre vie* (*Stead* v. *Platt* (1853) 18 Beav. 50).

(c) The issue need not have survived the wife (*Buckworth* v. *Thirkell* (1785) 3 Bos. & P. 652).

(d) *Eager* v. *Furnivall* (1881) 17 Ch. D. 115.

(e) Litt., s. 35.
Co. Litt. 29, 30.
Hope v. *Hope* [1892] 2 Ch. 336.

[It is immaterial that the property was expressly settled to the wife's separate use (*Appleton* v. *Rowley* (1869) L. R. 8 Eq. 139; *Cooper* v. *Macdonald* (1877) 7 Ch. D. 288). And, of course, a restraint on anticipation, which loses its effect on the wife's death, cannot deprive the husband of his curtesy after that event (*Cooper* v. *Macdonald*, *ubi sup.*). In lands subject to the custom of gavelkind, the husband has (until re-marriage) an estate by the curtesy of one half; but issue by him need not have been born, provided that, if born, they could have inherited from the wife (Co. Litt. 111 a, 30 a). There are also variations from the common law rule in some boroughs (Litt., s. 166). In copyholds, the claim of the husband is governed by the custom of the manor (*Brown's Case* (1581) 4 Rep., at fo. 22 a).]

Position of tenant

2076. A tenant by the curtesy has all the rights and liabilities of a tenant for life at the common law or in equity,[a] and has the statutory powers of leasing of a tenant for life under the Settled Estates Act, 1877,[b] and the statutory powers of a tenant for life under the Settled Land Acts, 1882–1890[c] (*ante*, Bk. III, Sect. VI, Tit. II).

(a) Bl. *Comm.* II, 122.

[For these rights and liabilities, see *ante*, Bk. III, Sect. I, Tit. IV.]

(b) Settled Estates Act, 1877, s. 46.
(c) Settled Land Act, 1882, s. 58 (viii).

Husband's rights in wife's personalty

2077. Subject to § 2078, *post*, a man is entitled, in the event of his wife's death, to all the corporeal personal estate (including separate property) to which she

died beneficially entitled, or in which she had an actual beneficial interest, legal or equitable, at the time of her decease, and which does not come to an end at her decease.[a] To her choses in action (*ante*, Bk. III, Sect. XIII) he becomes entitled on taking out letters of administration to her estate, but (*semble*) subject to her debts.[b]

(a) *Re Bellamy* (1883) 25 Ch. D. 620.
Re Lambert (1888) 39 Ch. D. 626.

[*Semble:* though a husband's title to his wife's undisposed of corporeal personal estate is complete by her death, he will, for practical reasons, be obliged to take out letters of administration in respect of it. (But see *Surman* v. *Wharton* [1891] 1 Q. B. 491.).]

(b) 31 Edw. III (1357) st. I, c. 11.
Statute of Frauds (1677) s. 25.

[The husband's right to administration, being a beneficial right, passes to his personal representatives, and even to his trustee in bankruptcy (*Drew* v. *Long* (1853) 22 L. J. Ch. 717).]

Wife's power of disposition

2078. The rights described in §§ 2075, 2076, 2077, *ante*, are defeated wholly, or *pro tanto*, by: —

(i) any disposition by the wife, either *inter vivos* or by her testament;

Hope v. *Hope* [1892] 2 Ch., at p. 339, *per* Stirling, J.

[Of course, if the marriage took place before 1883, and the wife had acquired the property before marriage, she would be incapable of disposing of it without her husband's consent (Married Women's Property Act, 1882, ss. 2, 5); unless it had been settled to her separate use, in which case the rule in the text would apply (*Cooper* v. *Macdonald*, *ubi sup.*, at pp. 295–6).]

(ii) a decree for the dissolution of the marriage between the person claiming the prop-

erty and the person whose property is claimed;

Wilkinson v. *Gibson* (1867) L. R. 4 Eq. 162.

[This was a case of the wife's reversionary personalty; but the reasoning and language apply with greater force to real estate and personalty in possession (see especially pp. 168, 169). The parties, in fact, have ceased to be husband and wife.]

(iii) a decree for judicial separation between similar parties, unless the parties have again cohabited;

Matrimonial Causes Act, 1857, s. 25.

(iv) a protection or separation order pronounced in favour of the wife, unless the parties have again cohabited;

Matrimonial Causes Act, 1857, s. 21.
Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a).

[It seems doubtful whether a protection order under the former of these two statutes excludes the husband from any property other than that acquired by the wife since his desertion.]

(v) any effectual direction for payment of her debts by the wife in her testament, even though the property in question was restrained from anticipation during her lifetime.

Sprange v. *Lee* [1908] 1 Ch. 424.

[Presumably, if the marriage took place before 1883, such a direction would, apart from exceptional cases such as those described in (ii), (iii), and (iv), only be effectual as regards property settled to the separate use of the wife or acquired by her since 1882 (Married Women's Property Act, 1882, s. 5). It seems doubtful how far, in the absence of such a direction, the claim of the wife's creditors would be preferred to the husband's curtesy. And there is

little (if any) express authority for saying that the husband's claim *jure mariti* to his wife's personal estate would be subject to her debts; unless these could be enforced under the express provisions of the Married Women's Property Acts (Act of 1882, ss. 14, 23; 1893, s. 1; *Surman* v. *Wharton* [1891] 1 Q. B. 491). But it has been held that where the wife's property was in fact vested in executors, they held in trust for the husband only after payment of her debts (*Re Lambert* [1888] 39 Ch. D. 626). And see the remarks of Neville, J., in *Sprange* v. *Lee*, *ubi sup.*, at p. 432.]

Widow's statutory claim

2079. If a man dies wholly intestate,[a] leaving a widow but no issue, and his whole property, real and personal, at the time of his decease,[b] does not exceed £500 in net value,[c] the whole of such property will belong to his widow.[d] Where the property of a man dying wholly intestate[a] and without issue exceeds in net value £500,[c] his widow will be entitled, in priority to all other claimants by way of inheritance or intestacy, to a sum of £500 thereout, absolutely and exclusively; and will have a charge for such sum upon the real and personal estates of her deceased husband, in proportion to their respective values.[e] Such provision will be in addition and without prejudice to her claims under the Statutes of Distribution (*ante*, Tit. III, § 2065) and in respect of dower (*post*, §§ 2080–2087).[f]

(a) *Re Twigg's Estate* [1892] 1 Ch. 579.

[But where a testator's will has become wholly inoperative by lapse of all the beneficial dispositions and the death of all the executors in his lifetime, he will die wholly intestate for the purposes of this § (*Re Cuffe* [1908] 2 Ch. 500).]

(b) *Re Heath* [1907] 2 Ch. 270.

(c) The net value of the real estate will be the value calculated in manner provided by the statute (s. 5) less any charges thereon, and of the personal estate the gross value (at the time of the intestate's death) less debts, funeral, and 'testamentary' (i. e. administration) expenses of the intestate (s. 6; *Twigg's Estate* [1892] 1 Ch., at p. 582, *per* Chitty, J.).

(d) Intestates Estates Act, 1890, s. 1.

[Presumably, in spite of the language of the Act, the widow only takes the beneficial interest; the legal ownership vesting in the representative or customary heir.]

(e) *Ibid.*, ss. 2, 3.

(f) *Ibid.*, s. 4.

[But of course the widow's claim to dower will be modified by the diminution in the value of the deceased's real estate caused by the statutory charge in her favour (*Re Charrière* [1896] 1 Ch. 912). Presumably, the same principle will apply to the personal estate. It does not appear to have been yet decided whether the claims of the widow under the statute will prevail against the claim of the Crown to *bona vacantia;* the Crown not being expressly bound by the statute.]

Dower

2080. Subject to §§ 2082 and 2084, the widow [(a)] of a man who dies solely and beneficially entitled [(b)] to any common socage real estate [(c)] in possession [(d)] (whether legal or equitable),[(e)] which issue of her by him might have inherited,[(f)] will be entitled to a life interest in one third of such real estate by way of dower;[(g)] and such interest will (*semble*) take priority over the unsecured debts of her husband.[(h)]

(a) The present law only applies to widows married since 1833 (Dower Act, 1833, s. 14). But the older law is now only of historical importance.

(b) The Dower Act, 1833 (s. 3) expressly renders it unnecessary, for purposes of a claim to dower, that the husband should have obtained actual possession of the land. But the widow's claim against an adverse possessor must be enforced within the period during which the husband's claim might have been so enforced

(*ibid.*). The interest of a joint tenant, however, which passes by survivorship, is not subject to dower (Co. Litt. 31 b). The older methods of barring dower were largely based on this rule.

(c) Claims to dower (or 'freebench') in copyholds are, *semble*, still governed by the custom of the manor (*Shaw* v. *Thompson* (1595) 4 Rep. 30 b; *Smith* v. *Adams* (1854) 5 De G. M. & G. 712); and local custom (e. g. gavelkind) still occasionally regulates the widow's claim to dower in socage. Gavelkind is, however, for some purposes, within the Act of 1833 (*Farley* v. *Bonham* (1861) 2 J. & H. 177).

(d) There can be no claim to dower out of a true reversion (*ante*, Bk. III, Sect. I, Tit. VIII, § 1167) or an interest *in futuro*; because the land could not have been set out by metes and bounds.

(e) Dower Act, 1833, s. 2.

(f) It is not necessary that it should be strictly an 'estate of *inheritance* in possession,' if it is equal thereto (*ibid.*, and *Re Michell* [1892] 2 Ch. 87). It is submitted that the criterion stated in the text is the correct one.

(g) Litt., s. 36.

[The amount of dower and freebench in copyhold and other customary estates is fixed by the custom (Litt., s. 37). In gavelkind lands the widow gets a half, but only *dum sola et casta* (Co. Litt. 33 b). The liability of incorporeal hereditaments (*ante*, Bk. III, Sect. I, Tit. IX) to dower is not clear. But Coke enumerates (Co. Litt. 32 a) certain franchises and freehold offices, tithes, commons, fisheries, rents, and advowsons, as liable. And it has been decided that a widow is entitled to dower out of shares in companies which are real estate (*Buckeridge* v. *Ingram* (1795) 2 Ves. Jun. 652).]

(h) *Spyer* v. *Hyatt* (1855) 20 Beav., at p. 623, *per* Romilly, M. R. *Jones* v. *Jones* (1858) 4 K. & J., at pp. 366–7, *per* Wood, V. C.

[These cases are, strictly speaking, *dicta* only, as regards this important point. But they were expressly followed by the High Court in Ireland in *Northern Bank* v. *McMackin* [1909] 1 Ir. R. 374, notwithstanding the words of s. 5 of the Dower Act.]

Assignment of dower

2081. In practice a claim to dower is satisfied by obtaining from the deceased's heir one third of the annual rents and profits of the land subject to dower.(a) But the dowress has a right to an assignment of one

third in value of such land by the Court, and will then be able to recover possession of it by ejectment.[b]

(a) *Williams* v. *Thomas* [1909] 1 Ch. 713 (where the modern practice is fully explained).

[This method of satisfaction supersedes the old right of 'quarantine' (Co. Litt. 32 b).]

(b) *Bamford* v. *Bamford* (1845) 5 Ha. 203.
Williams v. *Thomas, ubi sup.* (The valuation will be as at the time of the assignment, not the husband's decease.)

[If the land is sold by the personal representative of the deceased (with the widow's consent?) the widow is not entitled to a lump sum out of the purchase-money as compensation for dower, but only to her proper share of the income (*Re Wilson* [1916] 1 Ch. 220).]

Time for claim

2082. The claim of a widow to dower (previous to assignment) is not barred by any Statute of Limitation; but if she makes no claim for twelve years from her husband's decease, the Court will refuse her relief on the ground of laches.[a] The statutory period begins to run against her as from the date of the assignment;[b] and, in any case, only six years' arrears of rents and profits can be recovered by her against the heir.[c]

(a) *Marshall* v. *Smith* (1865) 5 Giff. 37, as interpreted by *Williams* v. *Thomas, ubi sup.*
(b) *Williams* v. *Thomas, ubi sup.*, at p. 725, *per* Fletcher Moulton, L. J.
(c) Real Property Limitation Act, 1833, s. 41.
Bamford v. *Bamford, ubi sup.*

Position of dowress

2083. A dowress has the rights and liabilities of a tenant for life at the common law and in equity;[a] and the powers of leasing conferred by s. 46 of the

Settled Estates Act, 1877 (*ante*, Bk. III, Sect. VI, Tit. II, § 1495).[b]

(a) Bl. *Comm.* II, 122.

[For these powers and liabilities, see *ante*, Bk. III, Sect. I, Tit. IV.]

(b) Settled Estates Act, 1877, s. 46.

[*Semble:* a dowress is not a 'tenant for life' for the purposes of the Settled Land Acts.]

Barring of dower

2084. A widow's claim to dower is barred (i. e. defeated) by: —

(i) any absolute disposition of the estate out of which it is claimed, by her husband in his lifetime or by his testament;

Dower Act, 1833, s. 4.

(ii) any declaration in the deed by which the estate was conveyed to her husband, or in any deed executed by him, that his widow should not be entitled to dower out of such estate;

Ibid., s. 6.

[Apparently, the declaration need not be by the husband.]

(iii) any declaration in her husband's testament that she shall not be entitled to dower out of such estate or out of any of his land;

Ibid., s. 7.

(iv) any devise by her husband to her, or for her benefit, of any real estate out of which

she would be entitled to claim dower if the same were not so devised,[a] or of any interest therein,[b] unless a contrary intention is declared by the testament;

(a) *Ibid.*, s. 9.
(b) Thus, a devise of any such real estate on trust for sale, with a trust for the widow of any part of the proceeds, will bar her right to dower (*Lacey* v. *Hill* (1875) L. R. 19 Eq. 346; *Thomas* v. *Howell* (1886) 34 Ch. D. 166).

(v) any settlement executed by the widow (being then of full age[a]) prior to her marriage with the deceased, whereby provision was expressed[b] to be made for her in lieu of her claim to dower;[c]

(a) *Caruthers* v. *Caruthers* (1794) 4 Bro. C. C., at p. 511, *per* Lord Alvanley, M. R.

[Would a settlement made by her under the provisions of the Infants Settlement Act, 1855 (*ante*, Bk. III, Sect. VII, Tit. I, § 1500) be deemed effectual for this purpose?]

(b) *Vernon's Case* (1572) Dyer, 317 a.
Charles v. *Andrews* (1725) 9 Mod. 151.
(c) *Dyke* v. *Rendall* (1852) 2 De Gex M. & G. 209.

(vi) any reasonable provision made for her in lieu of dower by any settlement made prior to the marriage, even though she was then under age;

Caruthers v. *Caruthers*, *ubi sup.*, at p. 513, *per* Lord Alvanley, M. R.
Corbet v. *Corbet* (1824) 1 Sim. & St. 612.

[The Statute of Uses (ss. 4, 5) laid down certain conditions as to the validity of a pre-nuptial jointure as a bar of dower; and these sections are explained by Coke in a well-known passage (Co. Litt. 36 b). But Courts of Equity were inclined to accept provisions not strictly complying with the statute, if they were reasonable (*Dyke* v. *Rendall*, *ubi sup.*).]

(vii) any provision accepted by a wife (*semble*, of full age) married after 1882, during the marriage, in lieu of dower;

Married Women's Property Act, 1882, ss. 1, 2.

[A provision accepted during marriage in lieu of dower by a woman married before 1882 is not binding on her; but she will be required after her husband's death to elect between it and her claim to dower (Statute of Uses, s. 7; *Slatter* v. *Slatter* (1833) 1 Yo. & C. Ex. 36). As to election see *ante*, Sect. I, Tit. IV, §§ 2021–2025.]

(viii) any joinder by the wife during the marriage in any disposition by the husband, for the purpose of releasing her claim to dower;

Dawson v. *Bank of Whitehaven* (1877) 6 Ch. D. 218.

[In this case the marriage had taken place before 1833 (Dower Act); and a release would now be unnecessary. Presumably, however, if the marriage took place before 1883, the wife's release would only be effectual if it were by deed acknowledged; though it is not stated in *Dawson* v. *Bank of Whitehaven* that the wife's release was so effected.]

(ix) a decree absolute for dissolution of the marriage;

Frampton v. *Stephens* (1882) 21 Ch. D. 164.

[A decree of judicial separation has not that effect (*ibid.*, at pp. 167–8, *per* Fry, J.).]

(x) the voluntary leaving of her husband and continuing adultery by the wife, unless her husband has subsequently voluntarily been reconciled to her.

Statute of Westminster II (1285) st. I, c. 34.

[The fact that the leaving of the husband was with the husband's consent (*Hethrington* v. *Graham* (1829) 6 Bing. 135), or caused by

his cruelty (*Woodward* v. *Dowse* (1861) 10 C. B. N. S. 722; *Bostock* v. *Smith* (1864) 34 Beav. 57) is immaterial for this purpose.]

[The provisions of this § appear to extend generally to claims of dower in gavelkind (*Farley* v. *Bonham* (1861) 2 J. & H. 177). But copyholds are not within the Dower Act (*Powdrell* v. *Jones* (1854) 2 Sm. & G. 407; *Smith* v. *Adams* (1854) 5 De G. M. & G. 712); and it is said that, for even an ante-nuptial settlement to deprive a widow of her freebench in copyholds, there must be a clear intention to that effect in the settlement (*Willis* v. *Willis* (1865) 34 Beav. 340).]

Claims prior to dower

2085. A widow's claim to dower at common law is subject to:—

(i) all partial estates and interests, and all charges created by any disposition or testament of her husband;

Dower Act, 1833, s. 5.

(ii) all debts, incumbrances, contracts, and engagements to which the estate out of which it is claimed is subject or liable;

Ibid.

[This provision does not, *semble*, postpone the widow's dower to the unsecured debts of the husband, though these are now payable out of his real estate (*ante*, § 2080). And it is the better opinion, that if a widow joins in a mortgage of her deceased husband's estate, she only postpones her claim to that of the mortgagee, unless an intention to release it entirely appears (*Meek* v. *Chamberlain* (1881) 8 Q. B. D. 31, distinguishing *Dawson* v. *Bank of Whitehaven*, *ubi sup.*, which was decided on the old law).]

(iii) any conditions, restrictions, or directions declared by the testament of her husband.

Ibid., s. 8.

Legacies do not bar dower

2086. A gift or bequest made by a husband to or for the benefit of his widow out of his personal estate, or out of any of his 'land' not liable to dower,[a] does not defeat or prejudice her right to dower; unless a contrary intention appears by the testament.[b]

(a) Presumably this means immovables to which dower does not attach at common law or by custom, e. g. leaseholds or estates *pur autre vie*, not real estate *primâ facie* subject to dower which has been conveyed to the husband with a declaration against dower (*ante*, § 2084 (ii)).
(b) Dower Act, 1833, s. 10.

Agreement not to bar dower

2087. A Court of Equity will enforce a covenant or agreement entered into by or on behalf of the husband not to bar his wife's dower.

Ibid., s. 11.

Dower in addition to other claims

2088. The claim of a widow to dower is in addition to her claim to a share of her husband's personal estate under the Statutes of Distribution[a] (*ante*, Tit. III, § 2065) and (subject to § 2079, n.) to her claim under the Intestates Estates Act, 1890.[b]

(a) *Couch* v. *Stratton* (1799) 4 Ves. 391.
(b) Intestates Estates Act, 1890, s. 4.
Re Charrière [1896] 1 Ch. 912.

TITLE V—SUCCESSION ON FAILURE OF HEIRS AND NEXT OF KIN

Escheat

2089. When a person dies intestate and without heirs[a] as to any fee simple interest,[b] whether legal or equitable, corporeal or incorporeal,[c] to which he is solely and beneficially entitled otherwise than as a mortgagee,[d] the interest, subject to claims to dower or curtesy (*ante*, Tit. IV), to the debts of the intestate,[e] and to the interest (if any) of the deceased's personal representative,[f] passes by escheat to the next lord of the fee, and, failing him,[g] to the next superior lord, and so on, and ultimately to the Crown.[h]

(a) It will be remembered that if the heirs traced from the purchaser fail, it is still possible that heirs traced from the deceased himself may succeed (*ante*, Tit. II, § 2052).

(b) Estates tail and base fees (*ante*, Bk. III, Sect. I, Tit. III) do not escheat, but come to an end, on failure of the heirs in tail, for the benefit of the reversioner or remainderman. As to estates *pur autre vie*, see *post*, § 2091.

(c) Intestates Estates Act, 1884, s. 4.

[Before this Act, the benefit of equitable interests for which no claimant could be found was usually taken by the owners of the legal estate (*Burgess* v. *Wheate* (1759) 1 W. Bl. 123).]

(d) This seems to be the construction placed on ss. 26 and 29 of the Trustee Act, 1893. In any case the interest of the *cestui que trust* or mortgagor could not be affected by an escheat of the interest of the trustee or mortgagee.

(e) Administration of Estates Act, 1833.
Evans v. *Brown* (1842) 5 Beav. 114.

[It seems a little doubtful how far the claim to an escheat by the Crown, which is not expressly bound by the Act of 1833, will be subject to payment of the deceased's debts (*Goods of Ball* [1902] W. N. 226).]

(f) Land Transfer Act, 1897, s. 2 (1).

[Where the Crown takes by escheat, the estate does not pass to the personal representative (*Goods of Hartley* [1899] P. 40).]

(g) Presumably, the title of any mesne lord not under disability will be barred at the expiry of twelve years from the intestate's death, but not sooner.

(h) Co. Litt. 13 a.

[Owing to the operation of the Statute *Quia Emptores* (18 Edw. I (1290) st. I, cc. 1–3), *ante*, Bk. III, Sect. I, Tit. II, § 1044, the claims of mesne lords to escheat in socage have become rare; and it is difficult to see how any person but the Crown could claim under the Act of 1884 (*supra*), for there can be no lord of an incorporeal hereditament or an equitable interest. But, in the case of copyhold or recently enfranchised estates (*ante*, Bk. III, Sect. I, Tit. V, § 1112 (i)), there is usually no difficulty in finding a mesne lord; and the rights of such person to an escheat of enfranchised land are expressly saved by the Copyhold Act, 1894, s. 21 (1) (b).]

Grants of escheated land

2090. No grant of any interest alleged to be escheated may be made by the Crown until an inquisition has been held and the title thereto found. Such inquisition must find of whom the interest was held.

Escheat Procedure Act, 1887, s. 2 (2) (3) (5).

Bona vacantia

2091. When a person dies intestate as to any personal estate (including an estate *pur autre vie*),[a] and there is no widow or next of kin or special occupant who is entitled to claim such estate under the pro-

visions of Titles II, III and IV, *ante*, such estate will pass to the Crown as *bona vacantia*;[b] unless it is vested in the executors of the deceased, and such executors are not expressly or by implication excluded by the testament of the deceased from taking it beneficially.[c]

(a) It seems to be clear that an estate *pur autre vie* limited to a special occupant passes as personalty if no special occupant can be found (Wills Act, 1837, s. 6).

(b) *Hensloe's Case* (1600) 9 Rep. 38 b.
Dyke v. *Walford* (1846) 5 Moo. P. C. 434.

[Of course it will be subject to payment of the deceased's debts, for there is no surplus until such debts are paid (*Kane* v. *Reynolds* (1854) 4 De G. M. & G., at p. 571, *per* Lord Cranworth, C.).]

(c) Executors Act, 1830, s. 2.
Russell v. *Clowes* (1846) 2 Coll. 648.
Re Bacon's Will (1886) 31 Ch. D. 460.
A. G. v. *Jeffreys* [1908] A. C. 411.

[Before the passing of the Executors Act, 1830, the presumption was that executors took undisposed of residue even against next of kin, unless evidence to the contrary appeared in the will (see preamble to the Act). The Act abolishes this presumption as regards the next of kin, but not as regards the Crown. Where there are no executors, *semble*, personal estate not effectively disposed of by the will passes to the Crown as *bona vacantia*. This consequence seems to follow from the wording of the preamble to the Executors Act, 1830, which was itself based upon the old view, that there was no true testament unless there was an executor (Lyndewode, *Provinciale*, 172 (*sub voc.* Intestatis), 173 (*sub voc.* Voluntatem ultimam); Swinburne, *Testaments*, Pt. I, § 3, par. 19).]

SECTION III

ADMINISTRATION OF ASSETS

TITLE I — THE PERSONAL REPRESENTATIVE

Classes of representatives

2092. A personal representative is either an executor, an administrator, or an executor *de son tort*.

Executor

2093. An executor is a personal representative appointed by testament to administer the estate of the testator in accordance with the lawful directions contained in the testament.

Farrington v. *Knightley* (1719) 1 P. Wms., at pp. 548–9.
Brownrigg v. *Pike* (1882) 7 P. D., at p. 64.

Administrator

2094. An administrator is a personal representative appointed by the Probate, Divorce, and Admiralty Division of the High Court,[a] in the circumstances described in §§ 2103, 2105–2108, to distribute the estate of the deceased in accordance with the law,[b] or with the terms of the deceased's testament, if any.[c]

(a) 31 Edw. III (1357) st. I, c. 11.
21 Hen. VIII (1529) c. 5, s. 2.
Court of Probate Act, 1857, s. 4.
Judicature Act, 1873, s. 16.

(b) 31 Edw. III (1357) st. I, c. 11.
(c) An administrator *cum testamento annexo* (*post*, § 2107) and an administrator *de bonis non administratis* (*post*, § 2103) may have to follow the directions of a testament; and a similar rule may apply to other limited grants of administration.

Executor de son tort

2095. An executor *de son tort* is a person who, without being either an executor or an administrator, takes upon himself to do acts in relation to the property of a deceased person which only an executor or administrator has authority to do.

Peters v. *Leeder* (1878) 47 L. J. (Q. B.) 573.
Wentworth, *Office of Executor* (14th edn.) p. 320.

Appointment of executor

2096. An executor is appointed either (i) expressly by the testator in his testament or by another person upon whom authority to do so has been conferred by the testament,[a] or (ii) by implication, when on the construction of the testament it appears that a person has been given authority by the testator to pay debts or to perform other functions appropriate to the office of an executor.[b] ('Executor according to the tenor.')

(a) *Goods of Deichman* (1842) 3 Curt. 123.

[Such a person may nominate himself (*Goods of Ryder* (1861) 2 Sw. & Tr. 127).]

(b) *Goods of Punchard* (1872) L. R. 2 P. & M. 369.
Goods of Adamson (1875) L. R. 3 P. & M. 253.
Goods of Pryse [1904] P. 301.
Estate of Mackensie [1909] P. 305.
Irwin v. *Caruth* [1916] P. 23.

[If there is any doubt as to the identity of the person appointed, the Court looks at the circumstances of the testator to decide (*Grant* v. *Grant* (1869) L. R. 2 P. & M. 8), but will not admit direct evidence of the testator's intention, except in a case of equivocation, i. e. where the description in the will is equally applicable to two or more persons (*Estate of Hubbuck* [1905] P. 129). The same rule applies to the case of legatees (*Re Ofner* [1909] 1 Ch. 60), and of devisees (*Re Halston* [1912] 1 Ch. 435). If the identity of the person appointed cannot be established, the appointment is void for uncertainty (*Goods of Blackwell* (1877) 2 P. D. 72).]

Capacity to act as executor

2097. Any person may be appointed an executor. But if a lunatic (whether so found or not[a]), or an infant,[b] is appointed sole executor, the Court will make a grant of administration during the lunacy[c] or infancy[d] to some other person. If a bankrupt is appointed sole executor, or a sole executor becomes bankrupt, the Court will appoint a receiver of the deceased's estate;[e] unless (*semble*) the testator knew of the bankruptcy when he made his testament.[f] If a solvent executor, who is willing to act, is also appointed, the Court will restrain the bankrupt from acting,[g] unless (*semble*) the testator was aware of his bankruptcy.[h]

(a) *Goods of Crump* (1820) 3 Phill. 497.
Ex parte Evelyn (1833) 2 My. & K., at p. 4.
(b) *Foxwist* v. *Tremain* (1669) 1 Mod. 47, *per* Twisden, J.
Goods of Marshall (1836) 1 Curt. 297.
(c) *Goods of Phillips* (1824) 2 Add. 336 n. (b).
(d) Administration of Estates Act, 1798, s. 6.

[The age of majority for this purpose was formerly seventeen. By s. 6 of this Act it is fixed at twenty-one. The Court's discretion in making grants during lunacy or infancy is absolute (*Goods of*

Hastings (1878) 4 P. D. 73; *Goods of Gardiner* (1884) 9 P. D. 66).]

(e) *Re Hopkins* (1881) 19 Ch. D. 61.

[Apparently this is a modern process (*Hills* v. *Mills* (1691) 1 Salk. 36; *R.* v. *Raynes* (1698) *ib.* 299.).]

(f) *Stainton* v. *Carron Co.* (1853) 18 Beav., at p. 161, *per* Romilly, M. R.
(g) *Bowen* v. *Phillips* [1897] 1 Ch. 174.
(h) *Gladdon* v. *Stoneman* (1808) 1 Madd. 143 n.

[A corporation can be appointed as an executor; but, if a corporation aggregate is appointed, it nominates a person to take administration with the testament annexed (*Goods of Darke* (1859) 1 Sw. & Tr. 516; *Goods of Hunt* [1896] P. 288). A corporation sole (e. g. The Public Trustee) can take a direct grant (*Re Haynes* (1842) 3 Curt. 75; Public Trustee Act, 1906, ss. 1, 6 (1)).]

General and special executors

2098. The appointment of an executor may be general, or it may be limited as to property,[a] as to place,[b] or as to duration;[c] or it may be made subject to a condition precedent,[d] or determinable upon the happening of a condition subsequent.[e]

(a) *Rose* v. *Bartlett* (1632) Cro. Car., at p. 293.
Goods of Harris (1870) 2 P. & M. 83.
Irwin v. *Caruth* [1916] P. 23.
(b) *Re Cohen's Executors* [1902] 1 Ch., at p. 188.
Irwin v. *Caruth, ubi sup.* (executor according to the tenor).
(c) *Graysbrook* v. *Fox* (1565) Plowd., at fo. 279, *per* Weston, J.
Swinburne, *Testaments*, Pt. IV, § 17, par. 1.
(d) *Goods of Langford* (1867) L. R. 1 P. & M. 458.
Goods of Foster (1871) L. R. 2 P. & M. 304.
(e) *Jenning's and Gower's Case* (1589) Cro. Eliz. 219.
Bond v. *Faikney* (1757) 2 Ca. *temp.* Lee, 371.
Goods of Lane (1864) 33 L. J. (P. M. & A.) 185.

Refusal of office

2099. A person appointed executor may refuse the office; even though he has promised the testator to

accept.[a] If he will not decide whether to accept or refuse, he may be cited by creditors or legatees before the Court and compelled to decide. If he does not appear when cited, he will be treated as if he had refused.[b]

(a) *Doyle* v. *Blake* (1804) 2 Sch. & Lef., at p. 239.

[As to the method of refusal, see *post*, § 2102.]

(b) Court of Probate Act, 1858, s. 16.

Acceptance of office

2100. An executor accepts office either by taking out probate,[a] or by 'intermeddling' — i. e. doing acts which only an executor has authority to do.[b] Neither an act of necessity,[c] nor the collection of information as to the condition of the estate,[d] constitutes acceptance of office.

(a) *Mohamidu Mohideen Hadjiar* v. *Pitchey* [1894] A. C. 437.

[A mere application for probate is not conclusive (*ibid.*).]

(b) *Long* v. *Symes* (1832) 3 Hagg. Eccl. 771 (advertising for creditors).
Vickers v. *Bell* (1864) 10 Jur. N. S. 376 (defending administration suit).
Re Stevens [1897] 1 Ch. 422 (payment of interest to creditor).

(c) *Long* v. *Symes*, *ubi sup.*, *per* Sir John Nicholl.

(d) Godolphin, *Orphan's Legacy* (2nd edn.), p. 102.

[An executor wishing to 'take out probate' must (i) carry into the Probate Registry the original will and codicils (if any), along with a copy engrossed on specially prepared paper; (ii) take the executor's 'oath' of office, which verifies the will and the testator's death, and undertakes duly to administer the estate; and (iii) make an affidavit containing particulars of the testator's property for the purpose of enabling the Inland Revenue Commissioners to calculate the amount of the Death Duties payable. After the affidavit has been passed at the Estate Duty Office, a 'grant' of probate under

the seal of the Court is annexed to the engrossed copy of the will and codicils (if any); and the combined documents become, in effect, the official authority of the executor for performing the duties of his office. This is 'probate in common form,' and is sufficient if everything is in order. But if the original will cannot be found, or there is a dispute as to the genuineness or validity of the will which is set up by the executor, it becomes necessary to 'establish' the will by 'probate in solemn form,' which involves the formal proof of the will before the Court and a jury (or the Court acting as a jury).]

No renunciation after acceptance

2101. An executor who has accepted office cannot renounce probate,[a] and can be compelled to take a grant.[b]

(a) *Goods of Badenach* (1864) 3 Sw. & Tr. 465.
(b) *Goods of Davis* (1860) 4 Sw. & Tr. 213.

[There is an old authority for saying that acceptance cannot be as to part of the estate; unless the appointment is limited in accordance with § 2098, *ante* (*Paul* v. *Moodie* (1620) 2 Roll. Rep., at p. 132).]

Renunciation of probate

2102. An executor refuses office by filing a renunciation of probate (which need not be under seal[a]) in the Court.[b] A renunciation of probate completely severs the connection of the person renouncing with the estate; and the representation of the testator devolves as if such person had never been appointed executor.[c] A renunciation cannot be retracted, except by leave of the Court;[d] and the Court, in granting or refusing leave, exercises an absolute discretion.[e]

(a) *Goods of Boyle* (1864) 3 Sw. & Tr. 426.
(b) *Goods of Morant* (1874) L. R. 3 P. & M. 151.

[Until the renunciation is filed, it is not absolutely binding (*ibid.*). For an executor who will neither act nor renounce, see *ante*, § 2099.]

(c) Court of Probate Act, 1857, s. 79.
(d) *Melville* v. *Ancketill* (1909) XXV T. L. R. 655.
(e) *Goods of Gill* (1873) L. R. 3 P. & M. 113.
Goods of Stiles [1898] P. 12.

Devolution of executorship

2103. On the death of one of several executors before the administration of the estate is complete, his office devolves on the survivor or survivors;[a] and on the death of a sole or a last surviving executor who has proved the testament, his office devolves upon his executor.[b] If such sole surviving executor dies intestate, or without having appointed an executor, the Court makes a grant of administration *de bonis non administratis* of his testator.[c]

(a) *Flanders* v. *Clarke* (1747) 3 Atk., at p. 510.
(b) *Wankford* v. *Wankford* (1700) 1 Salk., at pp. 305, 308, *per* Holt, C. J.
(c) *Ibid.*, at p. 305. (If the sole or surviving executor has not proved the testament, a grant of administration *cum testamento annexo* is made (*ibid.*); and for this and other cases in which such a grant is made, see *post*, § 2107.)

[The general executor of a special executor (*ante*, § 2098) represents the latter's testator (*Goods of Beer* (1851) 2 Rob. Eccl. 349); but the converse proposition does not hold (*Goods of Bridger* (1878) 4 P. D. 77). For the case of an executor who, after taking out probate, becomes incapable of acting, or disappears, see *post*, Tit. II, § 2124.]

Executorship not assignable

2104. The office of executor or administrator is not assignable;[a] but, with the sanction of

the Court, it may be transferred to the Public Trustee.[b]

(a) *Bedell* v. *Constable* (1664) Vaugh., at p. 182.
(b) Public Trustee Act, 1906, s. 6 (2).

Letters of administration

2105. When a person dies, leaving within the jurisdiction of the Court[a] property which devolves upon his personal representative, and leaving either no testament, or no operative testament,[b] the Court makes a general grant of administration.

[Letters of administration (equivalent to the grant of probate to an executor) are obtained by application to the Probate Registry by the person deeming himself to be entitled. He must (i) make an affidavit which states the necessary facts, including the grounds of the applicant's claim; (ii) make the Inland Revenue affidavit (*ante*, § 2100, n.); (iii) enter into a bond with a surety or sureties for the due performance of his office; (iv) when the application is necessitated by the testator's failure to appoint an executor, or the death or refusal to act of the executors appointed, carry in the original will and codicils (if any), and an engrossed copy thereof (*post*, § 2107). The rules which will guide the Court in granting administration, general or special, are stated in § 2106, *post*.]

(a) *Goods of Tucker* (1864) 3 Sw. & Tr. 585.
(b) *Re Ford* [1902] 2 Ch. 605.

[A general grant of administration is also made when, an action having been begun to set aside an alleged testament, the defendant fails to appear (*Goods of Quick* [1899] P. 187); and when the executor of an alleged testament, being cited to produce it, fails to appear (*Goods of Dennis*, *ibid.* 191).]

Order of claim to administration

2106. The following persons are entitled to apply to the Court for a general grant of administration according to the following rules:—

(i) A widower has the first right to be appointed administrator of his wife's property (*ante*, Sect. II, Tit. IV, § 2077); but if she has left real estate, the Court may prefer her heir at law or make a joint grant to the heir at law and the widower.

Land Transfer Act, 1897, s. 2 (4).
Goods of Ardern [1898] P. 147.
Goods of Roberts, ibid. 149.

[If husband and wife perish at the same time, grants are made to their respective next of kin (*Goods of Beynon* [1901] P. 141).]

(ii) The widow and the next of kin of a deceased person have an equal right to a grant; and the Court may make it to either or both.[a] But the Court usually makes a grant to the widow;[b] unless there is good reason why it should not.[c]

(a) 21 Hen. VIII (1529) c. 5, s. 3.
(b) *Webb* v. *Needham* (1823) 1 Add. 494.
(c) *Goods of Stevens* [1898] P. 126.

(iii) In choosing amongst the next of kin, the guiding principle adopted by the Court is the interest of the estate.

Warwick v. *Greville* (1809) 1 Phill., at p. 125, *per* Sir John Nicholl.

[For the numerous detailed rules which the Court has applied to decide between the conflicting claims of the next of kin *inter se*, see Williams, *Executors* (10th edn.), pp. 334–337.]

(iv) If there is real estate, the heir at law of the deceased, if he is not one of his next

of kin, is entitled to a grant equally with the next of kin.

Land Transfer Act, 1897, s. 2 (4).

(v) If there is no next of kin, the Crown is entitled to a grant of administration of the personal estate of the deceased.

Stote v. *Tyndall* (1757) 2 Lee, 394.
Treasury Solicitor Act, 1876, s. 2.

[The grant is limited to personal estate, as the Land Transfer Act, 1897, does not bind the Crown (*Goods of Hartley* [1899] P. 40). If the deceased was resident in the Duchy of Lancaster, the grant is made to the Solicitor to the Duchy (Treasury Solicitor Act, 1876, s. 9 (1); Intestates Estates Act, 1884, s. 8); and if in Cornwall, to the nominee of the Duke of Cornwall (*Solicitor to Duchy of Cornwall* v. *Canning* (1880) 5 P. D. 114).]

(vi) The Public Trustee is considered by the Court as entitled to a grant of administration equally with any other person or class of persons; but he will be postponed to the widower, widow, or next of kin of the deceased, unless good cause is shown to the contrary.

Public Trustee Act, 1906, s. 6 (1).
Public Trustee Rules, 1912, R. 6 (1) (b).

(vii) If none of the persons above mentioned are willing to take a grant, a grant may be made to a creditor of the deceased.

Elme v. *Da Costa* (1791) 1 Phill., at p. 177.

[Before such a grant is made, the Court generally requires all other persons (except the Public Trustee) entitled to the grant to be cited to accept or refuse (*Goods of Barker* (1837) 1 Curt. 592);

though this requirement may be dispensed with, and a grant made under rule (viii) below (*Goods of Atherton* [1692] P. 104).]

(viii) If the estate is insolvent, or if any other special circumstances exist, the Court may make a general or a limited grant to such person as it thinks fit.

Court of Probate Act, 1857, s. 73.

[The consent of all the parties interested is not by itself sufficient to induce the Court to exercise its powers under this section (*Goods of Richardson* (1871) L. R. 2 P. & M. 244). The question whether such special circumstances exist as will induce the Court to exercise its powers must be decided on the facts of each case as it arises (see *Goods of Moore* [1892] P. 145; *Goods of Jackson*, *ibid.* 257; *Goods of Trigg* [1901] P. 42).]

Administration with will annexed

2107. The Court will make a grant of administration *cum testamento annexo*, if a testator has not appointed an executor, expressly or by implication, by his testament;[a] or if an appointment of an executor fails to take effect by reason either of the death of the executor before the testator,[b] or before the executor has proved the testament,[c] or of his renunciation or failure to appear when cited to take probate.[d]

(a) *Graysbrook* v. *Fox* (1565) Plowd., at fo. 279. Coke, 2 Inst. 397.
(b) *Pullen* v. *Serjeant* (1684–5) 2 Ch. Rep. 300. *Goods of McAuliffe* [1895] P. 290.
(c) *Wankford* v. *Wankford* (1702) 1 Salk., at p. 308.
(d) *Garrard* v. *Garrard* (1871) 2 P. & M. 238.

[It may be necessary sometimes to make such a grant for a limited period, e. g. if the executor appointed by the testament is not

to take office till after a stated time from the death (*Graysbrook* v. *Fox*, *ubi sup.*, at fo. 279).]

Order of claim

2108. The Court has an absolute discretion in making a grant under § 2107;[a] but it usually appoints the person who has the largest interest in the estate.[b] The provisions of § 2106 (vi) and (viii) apply to such grants; and a grant can be made under § 2106 (viii), if a sole executor is at the time of the death resident out of the United Kingdom,[c] or incapable, owing to ill health, of taking probate.[d]

(a) *Rex* v. *Bettesworth* (1734) 2 Stra. 956.
Goods of Ewing (1881) 6 P. D., at pp. 24–5.
(b) *Wetdrill* v. *Wright* (1814) 2 Phill., at p. 248.
(c) Court of Probate Act, 1857, s. 73.
(d) *Estate of Davis* [1906] P. 330.

[The grant was made in this case to the nominees of the executor; but a grant may be made limited to the period of the executor's incapacity (*Goods of Ponsonby* [1895] P. 287).]

Supplementary grant

2109. On the death or disappearance of an administrator before the administration of the estate is complete, the Court appoints an administrator *de bonis non administratis* of his deceased.[a] In making such a grant, the Court usually follows the same principles as it followed in making the original grant.[b]

(a) *Estate of Saker* [1909] P. 233.
Bl. *Comm.* II, 506.
(b) *Walton* v. *Jacobson* (1765) 1 Hagg. 346. (But when a husband obtains a grant of administration to his wife, and dies without hav-

ing fully administered, the new grant is made, not to the next of kin of the wife, but to the representative of the husband, because the latter's right to administer is a beneficial right (*Fielder* v. *Hanger* (1832) 3 Hagg. 769).)

Capacity to act as administrator

2110. The provisions of § 2097, *ante*, apply, *mutatis mutandis*, if the person *primâ facie* entitled to a grant of administration is a minor,[a] or a lunatic.[b] The Court will not make a grant of administration to a bankrupt.[c]

(a) *Cartright's Case* (1678) 1 Freem. K. B. 258. (But here the grant was made to a guardian though one of the persons entitled was of full age.)

[Usually the grant is made to the guardian of the minor. In the case of a minor under the age of seven (according to the rules of ecclesiastical law an 'infant'), the Court assigns the guardian. In the case of a minor over seven, the guardian is chosen by the minor (*Rich* v. *Chamberlayne* (1752) 1 Ca. *temp.* Lee, 134).]

(b) *Ex parte Evelyn* (1833 2 My. & K. 3.

[The grant is usually made to the committee (*Goods of Phillips* (1824) 2 Add. 336 n. (b)).]

(c) *Coates' Case*, quoted in *Hills* v. *Mills* (1692) 1 Salk. 36.

[Limited grants of administration are made *durante absentiâ* (Court of Probate Act, 1858, s. 18; *Goods of Suarez* [1897] P. 82); *pendente lite* (Court of Probate Act, 1857, ss. 70, 71); *ad colligenda bona* (Court of Probate Act, 1857, s. 73; *Whitehead* v. *Palmer* [1908] 1 K. B. 151); till a testament is brought to this country (*Goods of Metcalf* (1822) 1 Add. 343), or till a lost testament is produced (*Goods of Wright* [1893] P. 21); limited to specific property, but only in exceptional cases (*Goods of Somerset* (1867) L. R. 1 P. & M. 350; *Goods of Ratcliffe* [1899] P. 110); or limited to specific acts (*Goods of Butler* [1898] P. 9). In certain exceptional cases, defined by statute, no representation to the deceased is needed; e. g. Army Pensions Act, 1830, s. 5; Loan Societies Act, 1840, s. 11; Army Prize (Shares of Deceased) Act, 1864, s. 3; Navy and Ma-

rines (Property of Deceased) Act, 1865, s. 6; Building Societies Act, 1874, s. 29; Provident Nominations and Small Intestates Act, 1883, s. 7; Superannuation Act, 1887, s. 8; Savings Bank Act, 1887, s. 3 (1); Industrial and Provident Societies Act, 1893, ss. 25, 26, 27 (1); Merchant Shipping Act, 1894, s. 176; Friendly Societies Act, 1896, ss. 56, 57.]

Judicial trustee

2111. The Court may, on the application of an executor or administrator, or of a beneficiary, in the exercise of its discretion, appoint a judicial trustee (*ante*, Bk. III, Sect. XVII, Tit. II, § 1780) of the deceased's estate, either jointly with any other person, or as sole trustee.

Judicial Trustees Act, 1896, s. 1 (2).

[An executor or administrator may himself be appointed a judicial trustee (Judicial Trustee Rules, 1897, r. 25).]

Executor de son tort

2112. If a person who is neither an executor nor an administrator performs an act of administration[(a)] or otherwise intermeddles with the estate of a deceased person,[(b)] he is an executor *de son tort;* and a person who intermeddles with the assets under the direction of an executor *de son tort* is himself an executor *de son tort.*[(c)] But if the intermeddling with the estate is of such a kind that it would be justifiable in a finder of goods, and there is no intention to assert any dominion over the property, it will not make the person intermeddling an executor *de son tort.*[(d)] And a person who receives payment of a debt

due to him,[e] or property belonging to the deceased,[f] from an executor *de son tort*, is not himself, by virtue of such receipt, an executor *de son tort*.

(a) *New York Breweries Co.* v. *A.-G.* [1899] A. C. 62.
(b) *Read's Case* (1604) 5 Rep. 33 b.
Edwards v. *Harben* (1788) 2 T. R., at p. 597, *per* Buller, J.
(c) *A.-G.* v. *New York Breweries Co.* [1898] 1 Q. B., at p. 221, *per* Rigby, L. J.
(d) *Sharland* v. *Mildon* (1846) 5 Ha. 469.
Peters v. *Leeder* (1878) 47 L. J. (Q. B.), at p. 574, *per* Lush, J.
(e) *Hursell* v. *Bird* (1891) 65 L. T. 709.
(f) *Paull* v. *Simpson* (1846) 9 Q. B. 365. (But he might be liable if he took trust property with notice of the trust (*Hill* v. *Curtis* (1865) L. R. 1 Eq., at p. 101).)

[Whether or not a person has intermeddled is a question of fact for the jury; whether the intermeddling will make the intermeddler an executor *de son tort* is a question of law for the Court (*Padget* v. *Priest* (1787) 2 T. R., at pp. 99, 100, *per* Buller, J.).]

Statutory executor de son tort

2113. If a person obtains the personal property of an intestate, or secures the release or discharge of any debt or duty owing to the intestate, without adequate consideration, or from an administrator to whom he has fraudulently procured a grant of administration to be made with this object, he will be liable as an executor *de son tort* to the extent of the value of the property so acquired or the debts or duties so released or discharged. But he may deduct all just debts due to him from the intestate at the time of his decease, and all payments made by him in due course of administration.

43 Eliz. (1601) c. 8, s. 2.

[*Quære:* are the provisions of this enactment now applicable to real estate by virtue of the Land Transfer Act, 1897, s. 2 (2)?]

Liability of executor de son tort

2114. An executor *de son tort* is under the same liabilities to the creditors[a] and the beneficiaries[b] of the estate as a rightful representative, to the extent of the property which has come to his hands;[c] but, when sued by them, he can plead that he has fully administered,[d] or that the claim is barred by the Statutes of Limitation,[e] or that he has accounted to the rightful representatives before action brought,[f] or that he has been acting for a person who has subsequently taken out administration.[g]

(a) *Rayner* v. *Koehler* (1872) L. R. 14 Eq. 262.
Coote v. *Whittington* (1873) L. R. 16 Eq. 534.
(b) 1 Rolle, *Ab.* 919, Executors, F. pl. 1.
(c) *Coote* v. *Whittington*, *ubi sup.*, at p. 647.
(d) *Oxenham* v. *Clapp* (1831) 2 B. & Ad., at p. 314.

[*Semble*, such a plea would be proved by showing due administration of such assets only as had come to the defendant's hands (*Hooper* v. *Summersett* (1810) Wighter. 16).]

(e) *Webster* v. *Webster* (1804) 10 Ves. 93.
(f) *Oxenham* v. *Clapp*, *ubi sup.*, at pp. 314–5.
Hilt v. *Curtis* (1865) L. R. 1 Eq. 90.
(g) *Hill* v. *Curtis*, *ubi sup.*, at p. 100.

Authority of executor de son tort

2115. Acts done by an executor *de son tort* in a due course of administration are valid;[a] and creditors and beneficiaries of the deceased get a good title to property thus duly transferred to them.[b] An executor *de son tort* is liable to the rightful representative for such acts; but the damages recoverable against him will be nominal, unless the rightful representative has been thereby deprived of any of

his privileges.[c] If property is transferred or any other act done by an executor *de son tort*, otherwise than in a due course of administration, the creditors and beneficiaries in whose favour such acts are done, cannot take advantage of such acts; and the rightful representative can recover the property or full damages therefor against them.[d]

(a) *Coulter's Case* (1599), at fo. 30 b.
Oxenham v. *Clapp* (1831) 2 B. & Ad., at p. 314.
(b) *Parker* v. *Kett* (1702) 1 Ld. Raym., at p. 661.
Mountford v. *Gibson* (1804) 4 East, at pp. 446–7.
Thomson v. *Harding* (1853) 2 El. & Bl. 630.
(c) *Graysbrook* v. *Fox* (1565) Plowd., at fo. 282.
Padget v. *Priest* (1787) 2 T. R., at p. 100.
Thomson v. *Harding*, *ubi sup.*, at p. 639.
Bl. *Comm.* II, 508.
(d) *Graysbrook* v. *Fox*, *ubi sup.*
Padget v. *Priest*, *ubi sup.*, at p. 100.
Mountford v. *Gibson*, *ubi sup.*, at pp. 446–7.

Enforcement of liabilities

2116. The personal liability of an executor *de son tort*, who has wasted or converted to his own use the property of the deceased, can be enforced against his executors or administrators;[a] but his liability as representative of the deceased does not pass to them.[b]

(a) 30 Car. II (1677) st. I, c. 7, s. 2, made perpetual by 4 & 5 W. & M. (1692) c. 24, s. 11.
(b) *Wilson* v. *Hodson* (1872) L. R. 7 Exch. 84.

Cannot be compelled to administer

2117. An executor *de son tort* cannot be compelled to take out letters of administration.

Goods of Davis (1860) 4 Sw. & Tr. 213.

TITLE II—THE TITLE AND INTEREST OF THE PERSONAL REPRESENTATIVE

Title of executor

2118. The title of an executor is derived from the testament;[a] and all the property of the testator which devolves upon him vests in him at the testator's death.[b] But the executor must obtain probate before he can establish his title to the property, or his right to perform the functions of an executor.[c]

(a) *Comber's Case* (1721) 1 P. Wms. 766.
(b) *Woolley* v. *Clark* (1822) 5 B. & Ald. 744.
(c) *Smith* v. *Milles* (1786) 1 T. R., at p. 480.
Tarn v. *Commercial Bank of Sydney* (1884) 12 Q. B. D. 294.
Re Masonic Life Assurance Coy. (1885) 32 Ch. D. 373.

[The rule that the representative can bring trespass for wrongs to the deceased's chattels before probate (*Oughton* v. *Seppings* (1830) 1 B. & Ad., at p. 244) but not trover (*Pinney* v. *Pinney* (1828) 8 B. & C. 335), illustrates this principle. In the former case, the representative is in possession of the deceased's property, and proof of his title is not necessary; in the latter case, proof of his title is (generally) necessary.]

Title of administrator

2119. The title of the administrator is derived[a] and (subject to § 2120) dates[b] from the grant of administration. In the interval between the death and the grant of administration, the personal estate of the deceased is vested in the President of the Probate, Divorce, and Admiralty Division of the High

Court;[c] and the real estate is vested in the heir or devisee.[d]

(a) *Comber's Case* (1721) 1 P. Wms. 766.
(b) *Woolley* v. *Clark* (1822) 5 B. & Ald. 744.
(c) Court of Probate Act, 1858, s. 19.
Judicature Act, 1873, s. 3.
(d) *John* v. *John* [1898] 2 Ch., at pp. 576–7.

Relation back

2120. When a grant of administration has been made, the title of the administrator relates back to the death for the following purposes:—

(i) to enable the administrator to sue for wrongs committed in respect of the property of the deceased between the death and the grant;

Tharpe v. *Stallwood* (1843) 5 M. & G. 760.
Foster v. *Bates* (1843) 12 M. & W., at p. 233, *per* Parke, B.
Goods of Pryse [1904] P., at p. 305.

(ii) to validate dispositions of the deceased's property,[a] or contracts affecting such property,[b] made or entered into by the administrator during the same period, provided that they are for the benefit of the estate, and in a due course of administration;[c]

(a) *Morgan* v. *Thomas* (1853) 8 Exch., at p. 307, *per* Parke, B.
(b) *Foster* v. *Bates*, *ubi sup.*
(c) *Whitehall* v. *Squire* (1691) 1 Salk. 295.
Morgan v. *Thomas*, *ubi sup.*
Foster v. *Bates*, *ubi sup.*
Re Watson (1886) 18 Q. B. D. 116.

(iii) to enable the administrator to claim as adverse possessor under the Real Property Limitation Act (*ante*, Bk. III, Sect. IV, Tit. IV, §§ 1429–1436).

Real Property Limitation Act, 1833, s. 6.

[But as no right of action accrues to the administrator till the grant, the six years fixed by the Limitation Act, 1623, s. 3, do not begin to run as against him until the grant is made (*Murray* v. *East India Coy.* (1821) 5 B. & Ald. 204; *Pratt* v. *Swaine* (1828) 8 B. & C. 285).]

But the doctrine of relation back does not apply so as to expose the estate to liability for work done without the authority of the administrator;[a] nor (*semble*) to divest any rights belonging to third parties which have come into existence between the date of the death and the date of the grant.[b]

(a) *Re Watson* (1887) 19 Q. B. D. 234.

[But the administrator can ratify acts done without authority if they are for the benefit of the estate, and done in a due course of administration (*Foster* v. *Bates* (1843) 12 M. & W. 226); though not otherwise (*Re Watson* (1886) 18 Q. B. D. 116; (1887) 19 Q. B. D. 234).]

(b) *Waring* v. *Dewberry* (1717) cited in argument in *Rex* v. *Mann* (1726) Gilb. *Eq. Rep.* 223–4.

Possession and title

2121. The possession of chattels personal,[a] and the title to reversionary interests in chattels real,[b] and (*semble*) incorporeal hereditaments, remainders, reversions, and executory interests in socage,[c] vest in the executor or administrator from the date of the

death or the grant of administration respectively; the possession of land vests as from the date of entry upon the land.[d]

(a) *Smith* v. *Milles* (1786) 1 T. R., at p. 480.
(b) *Prattle* v. *King* (1681) Sir T. Jones, 169.
(c) Land Transfer Act, 1897, s. 1 (1).
(d) *Ibid.*
Rendall v. *Andreæ* (1892) 61 L. J. (Q. B.) 630.

Co-ownership of representatives

2122. Co-representatives are joint and several owners of such of the property of the deceased as vests in them;[a] and, subject to Tit. VII, § 2202, *post*, any one of them can perform the functions of a sole representative in respect thereof.[b]

(a) *Owen* v. *Owen* (1738) 1 Atk., at p. 495.
(b) *Cole* v. *Miles* (1852) 10 Ha. 179 (alienation of assets).
Charlton v. *Earl of Durham* (1869) L. R. 4 Ch. App. 433 (giving receipts for debts due to the estate).

Fiduciary ownership of representative

2123. The property of the deceased which vests in the personal representative vests in him in right of the deceased, and not in his own right;[a] and the property thus vested in the representative is deemed to be separate from property which is vested in the representative in his own right.[b]

(a) *Pinchon's Case* (1612) 9 Rep., at fo. 88 b.
Farr v. *Newman* (1792) 4 T. R. 621.
(b) *Farr* v. *Newman, ubi sup.*
Re Radcliffe [1892] 1 Ch. 227.

But:—

(i) lapse of time, and enjoyment, with the consent of the beneficiaries, of the assets in a manner inconsistent with the trusts of the testament, may raise an inference that the assets have become the property of the representative in his own right; and

Re Morgan (1881) 18 Ch. D., at p. 100, *per* Fry, J.

(ii) the creditors of the deceased may by their conduct preclude themselves from asserting, as against the creditors of the representative, that the property belongs to the representative in right of the deceased.

Ray v. *Ray* (1815) Cooper, 264.
Fox v. *Fisher* (1819) 3 B. & Ald. 135.
Kitchen v. *Ibbetson* (1873) L. R. 17 Eq. 46.

[For the powers of alienation vested in the representative, and the conditions of their exercise, see *post*, Tit. VII, § 2201.]

Revocation of grant

2124. The Court will revoke a grant of probate or letters of administration if the grant has been obtained by false or fraudulent allegations,[a] or if a later testament is found,[b] or if the personal representative becomes incapable of acting,[c] or disappears.[d]

(a) *Harrison* v. *Weldon* (1731) 2 Stra. 911.
Goods of Bergman (1842) 2 Notes of Cases, 22.
Goods of Birch [1902] P. 130.
(b) *Woolley* v. *Clark* (1822) 5 B. & Ald. 744.
(c) *Offley* v. *Best* (1668) 1 Sid., at pp. 372–3.
(d) *Goods of Covell* (1889) 15 P. D. 8.
Goods of Loveday [1900] P. 154.

[For a detailed account of the various other grounds on which the Court will revoke a grant, see Williams, *Executors* (10th edn.), pp. 449–459. Presumably, when a grant has been revoked, and there is no executor entitled, a grant *de bonis non administratis* (*ante*, Tit. I, § 2109) is made to a new administrator (*Garter* v. *Dee* (1671) 1 Freem. K. B. 13; *Warren* v. *Kelson* (1858) 1 Sw. & Tr. 290).]

Validity of acts before revocation

2125. Notwithstanding the revocation of a grant of probate or administration:

(i) acts previously done by the representative in due course of administration of the estate are not thereby rendered invalid;

Boxall v. *Boxall* (1884) 27 Ch. D. 220.
Hewson v. *Shelley* [1914] 2 Ch. 13.

(ii) payment previously made to the representative under such grant in good faith discharge the payer;

Court of Probate Act, 1857, s. 77.

(iii) the representative is entitled to be reimbursed payments made by him in a due course of administration;

Ibid.

(iv) persons who have made any payment or transfer to him upon the faith of such probate or administration will not be thereby prejudiced.

Ibid., s. 78.

TITLE III—RIGHTS AND LIABILITIES PASSING TO THE PERSONAL REPRESENTATIVE

Property passing to representative

2126. All the property of a deceased person (but not property over which he has a general power of appointment which he has exercised by his testament[a]), other than property held by him as a joint owner (*ante*, Bk. III, Sect. XVI, Tit. II, § 1753), or as a tenant in tail or quasi tail,[b] whether or not it is disposed of by his testament, vests at his decease in his personal representative;[c] except that the legal estate[d] in land of copyhold or customary freehold tenure, in any case in which an admission or any act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant, does not so pass, but vests in the customary heir.[e]

(a) *O'Grady* v. *Wilmot* [1916] 2 A. C. 31.
(b) Estates tail would appear to be within the literal wording of s. 1 of the Land Transfer Act, 1897; but, having regard to the fact that they are not assets for payment of the deceased tenant's debts, would seem not to be within its purpose.
(c) Conveyancing Act, 1881, s. 30 (trust and mortgage estates).
Land Transfer Act, 1897, s. 1 (1).
(d) *Ibid.*, s. 1 (4).
Somerville's & Turner's C. [1903] 2 Ch. 585.
(e) Copyhold Act, 1894, s. 88.
Land Transfer Act, 1897, s. 1 (4).

[The estate *pur autre vie* limited to a special occupant is not expressly mentioned in the Land Transfer Act, 1897, s. 1; but,

regard being had to the fact that it is by the Wills Act, 1837, s. 6, expressly made assets for payment of the deceased tenant's debts, it would appear to fall within the scope of the former statute, and to pass to the personal representative accordingly. Where there is no special occupant, the estate *pur autre vie* goes to the personal representative under s. 6 of the Wills Act, 1837.]

Claim to share of partnership property

2127. Subject to any agreement between the partners, the amount due from surviving partners to the personal representatives of a deceased partner in respect of the deceased partner's share in the partnership property, is a debt accruing at the date of his death;[a] and the representative of the deceased partner has a general lien upon the surplus assets of the partnership for the amount due.[b]

(a) Partnership Act, 1890, s. 43.
(b) *Re Bourne* [1906] 2 Ch., at p. 432, *per* Romer, L. J.

[Such a lien is, as the Court pointed out, only in the nature of an equitable charge, which does not prevent dealing with the assets by the surviving partners, at any rate in favour of *bonâ fide* purchasers, but merely entitles the lienor to a sale by the Court. It bears little, if any, resemblance to a common law lien on goods (*ante*, Bk. III, Sect. X, Tit. II, §§ 1591–1603).]

Nature of property passing

2128. Subject to §§ 2129–2140, *post*, the question whether property of the deceased passing to the personal representative or the customary heir is real or personal estate, is determined by the actual condition of the property at the time of the decease.

Re Grange [1907] 1 Ch., at p. 315, *per* Parker, J.

Equities of redemption and mortgages

2129. If real estate belonging to the deceased is subject to a mortgage at the time of his decease, the equity of redemption passes as real estate to his personal representative or customary heir, as the case may be.[a] The interest of a deceased mortgagee of real estate passes to his personal representative or customary heir as personalty; even though the mortgagor's equity of redemption is afterwards barred by lapse of time.[b] But if, after the mortgagee's death, the title of the mortgagor becomes barred by lapse of time, the property then becomes real estate for the purposes of devolution.[c]

(a) *Fawcet* v. *Lowther* (1751) 2 Ves. Sen. 300.
(b) *A.-G.* – v. *Vigor* (1803) 8 Ves., at p. 277.
Re Loveridge [1902] 2 Ch. 859.

[*A fortiori*, the interest of a mortgagee of personal estate passes to his representative as personalty.]

(c) *Re Loveridge* [1904] 1 Ch. 518.

Options to purchase

2130. If a lessee for years has an option to purchase the reversion on the term, and the option is exercised after his death by his personal representative, the reversion (even though it is, for other purposes, real estate) passes as part of the personal estate of the lessee.

Re Adams and Kensington Vestry (1884) 27 Ch. D. 394.

Arrears of rents

2131. Rent incident to a freehold reversion, or a rent charge (*ante*, Bk. III, Tit. IX, §§ 1280–1294)

held for a freehold interest, arising in respect of the period after the death of the owner of such reversion or rent charge, passes to his personal representative as real estate; but arrears of such rent which have accrued in the life-time of the reversioner or rent-charger pass to his representative as personal estate.

Apportionment Act, 1870, s. 4.
Godolphin, *Orphan's Legacy* (2nd edn.), Pt. II, c. 13, § 3.

[Annuities generally pass as personalty, unless granted with words of inheritance (*Stafford* v. *Buckley* (1750) 2 Ves. Sen. 169; *Parsons* v. *Parsons* (1869) L. R. 8 Eq. 260).]

Partnership real estate

2132. In the absence of agreement to the contrary between the partners, real estate which passes to the personal representative of a deceased partner as part of his share in the partnership assets, passes as personal estate.

A.-G. v. *Hubbuck* (1884) 13 Q. B. D., at pp. 289, 290, *per* Bowen, L. J.

[Partners are usually made joint tenants of real estate acquired for partnership purposes; and, on the death of one of them, his legal interest passes, therefore, to the survivors and not to his representative (*ante*, Bk. III, Sect. XVI, Tit. II, § 1754).]

Heirlooms and fixtures

2133. Heirlooms (*ante*, Bk. III, Sect. IX, Tit. II, § 1550), though chattels, pass with the land to which they are annexed as real estate;[a] but fixtures[b] and emblements,[c] in so far as they are legally severable

from the land to which they are attached, pass to the personal representative of the owner of the land as personal estate.

(a) *Hill* v. *Hill* [1897] 1 Q. B. 483.

[The same rule applies to fish in a pond, deer in a park, conies in a warren, and doves in a dove house (Co. Litt. 8 a).]

(b) *Leigh* v. *Taylor* [1902] A. C. 157.
Re Hulse [1905] 1 Ch., at p. 410.
Re Whaley [1908] 1 Ch. 615.
(c) *Lawton* v. *Lawton* (1743) 3 Atk., at p. 16.
Cooper v. *Woolfitt* (1857) 2 H. & N. 122.

[Generally speaking, however, as between the successors (whether by intestacy or testamentary disposition) of a deceased owner in ee simple, there is no presumption that the claimants of the personalty are entitled to sever fixtures or emblements (*Re Roose* (1880) 17 Ch. D. 696; *Re Hulse*, *ubi sup.*, at p. 410; *Re Whaley*, *ubi sup.*, at p. 620). But such presumption may be raised by the provisions of a will. Of course where the deceased is not owner of the land, fixtures and emblements which he or his representative was or is entitled to sever pass, *à fortiori*, as personal estate.]

Conversion

2134. When, either by a testament or transaction *inter vivos*, real estate is directed or contracted, either by its beneficial owner, or by its fiduciary owner lawfully acting under any power vested in him, to be sold or otherwise exchanged for personal estate, or when by Act of Parliament or the order of a Court of competent jurisdiction a similar direction is given, such real estate will, from the time at which such direction or contract becomes binding, be regarded in equity as personal estate, and will, subject to §§ 2135, 2136, and 2138–2140, *post*, be treated as such in the distribution of the assets of its owner; whether or not

the direction or contract has actually been carried out. The converse of this rule applies to personal estate directed or contracted to be invested in the acquisition of real estate.

Fletcher v. *Ashburner* (1779) 1 Bro. C. C., at p. 499, *per* Sir Thomas Sewell, M. R.
A.-G. v. *Brunning* (1860) 8 H. L. C. 243.
Re Cleveland's Settled Estates [1893] 3 Ch. 244.
Re O'Grady [1915] 1 Ch. 613.

[The doctrine of Conversion is not confined to administration of assets (*Re Gosselin* [1906] 1 Ch. 120); but by far the greater number of cases affected by it fall under that head, because for most other purposes it is immaterial whether a fund is treated as real or personal estate. It should be realized, however, that administration purposes include not merely distribution among heirs and next of kin, but also incidence of Death Duties (*A.-G.* v. *Brunning*, *ubi sup.*; *Re O'Grady*, *ubi sup.*), marital claims (*Sweetapple* v. *Bindon* (1705) 2 Vern. 536), and order of resort for payment of debts and legacies (*post*, Titt. V and VI). But it should also be observed that, while Equity regards land directed to be sold as personalty, and conversely, a fund directed to be invested in the purchase of land in a particular place will not be regarded as real estate in that place, until the investment has been actually made (*Re Cleveland's Settled Estates*, *ubi sup.*; *Re Upton Cottrell Dormer* (1915) 84 L. J. (Ch.) 861). Moreover, a mere power to sell or invest will not operate as a conversion until the power is lawfully exercised (*Re Dyson* [1910] 1 Ch. 750); though, on the other hand, if there is a clear direction to sell or invest, a power to postpone sale or investment will not prevent the application of the doctrine (*Re Bird* [1892] 1 Ch. 279). A trust or direction for sale which is not binding because the trustees are the only persons interested, will not work a conversion (*Re Newbould* (1914) 110 L. T. 6); and a similar rule holds if the direction or trust is only exerciseable on the request, or with the consent, of a person who has not in fact requested or consented (*Re Goswell's Trusts* [1915] 2 Ch. 106; *Re Rogers* [1915] 2 Ch. 437).]

Failure of testamentary direction

2135. When such a direction as is described in § 2134 is contained in a testament, and the purposes

for which it is expressed to be made have been fulfilled or have failed, wholly or partially, leaving a surplus of the fund undisposed of, such undisposed of surplus will be treated, in the administration of the testator's assets, as if such direction had never been given with regard to it.[a] For the purposes of this §, a residuary devise or bequest is not regarded as a disposition;[b] unless there is an expression of intention to that effect in the testament.[c]

(a) *Ackroyd* v. *Smithson* (1780) 1 Bro. C. C. 503.
Cogan v. *Stephens* (1835) 5 L. J. Ch. 17.
Bective v. *Hodgson* (1864) 10 H. L. C., at p. 667, *per* Lord Westbury, C.
(b) *Amphlett* v. *Parke* (1831) 2 Russ. & M. 221.
(c) *Court* v. *Buckland* (1876) 1 Ch. D. 605.

Total and partial failure

2136. When a person succeeds to property by reason of the failure of the purposes of the testator, under the rule set out in § 2135, then, if such failure was total, the property will, for purposes of the distribution of the assets of such successor, be regarded (subject to § 2140) as of the character which it bore at the testator's death, whether or not the direction has in fact been carried out.[a] If such failure was partial only, the property will, for similar purposes, be regarded as of the character which it would have assumed if the direction of the testator had been carried out; whether or not such direction has in fact been carried out.[b]

(a) *Smith* v. *Claxton* (1819) 4 Madd. 484.
(b) *Curteis* v. *Wormald* (1878) 10 Ch. D. 172.
Re Richerson [1892] 1 Ch. 379.

[Certain expressions of the Court in the case of *Curteis* v. *Wormald* (1878) 10 Ch. D. 172, though explained by Chitty, J., in *Re Richerson*, *ubi sup.*, seem to be somewhat inconsistent with the latter decision. But *Re Richerson* is usually regarded as settling the law.]

Failure of direction inter vivos

2137. When such a direction as is described in § 2134 is contained in a transaction *inter vivos*, then, subject to § 2140 (*post*), even though the direction is not to take effect till the death of the settlor, the fund will, as from the date of the transaction, be regarded for all purposes of succession as though such direction had been in fact carried out; [a] unless (*semble*) at the time when the direction became operative, there was no person in existence (or capable of coming into existence) entitled to enforce it.[b]

(a) *Hewitt* v. *Wright* (1780) 1 Bro. C. C. 86.
Griffith v. *Ricketts* (1849) 7 Ha., at pp. 311–2, *per* Wigram, V. C.
Clarke v. *Franklin* (1858) 4 K. & J., at p. 264, *per* Wood, V. C.
(b) *Re Grimthorpe* [1908] 2 Ch. 675.

[Owing to the ambiguity of the expression 'failure of purposes,' there has been considerable doubt as to the true doctrine in the case of a settlement *inter vivos;* and, unfortunately, this doubt has not been removed by the expressions of Lord Cozens-Hardy, M. R., in the recent case of *Re Grimthorpe*, *ubi sup.*, at pp. 678–9, where his lordship, referring to the case of *Davenport* v. *Coltman* (1842) 12 Sim. 610, seems to take the view that, whether or not the direction in the settlement might have been operative, yet, if, in the events which happened, it could not have been enforced, there will be no conversion. The point was not necessary for the decision in *Re Grimthorpe*, which was covered by § 2140; but it may be pointed out that, in *Davenport* v. *Coltman*, (1) the settlement was by will, (2) the direction was nugatory from the time the settlement took effect, because the purposes of it failed in the testator's lifetime.]

Sale under Partition Acts

2138. Where there has been an order for sale of land and division of the proceeds under the Partition Act, 1868 (*ante*, Bk. IV, Sect. XVI, Tit. I, § 1749), a share in the land directed to be sold belonging to a person under disability is not deemed to be personal estate; even after the order has been carried into effect, and even though a request for sale has been made on behalf of the person under disability.

Foster v. *Foster* (1875) 1 Ch. D. 588 (infant).
Re Barker (1881) 17 Ch. D. 241 (lunatic).
Hopkinson v. *Richardson* [1913] 1 Ch. 284 (infant).

[The reason for this anomalous exception appears to be, that s. 8 of the Partition Act, 1868, incorporates s. 23 of the Settled Estates Act, 1856, which, though repealed for general purposes, is still in force as part of the Partition Act. There seems at one time to have been considerable doubt as to whether any alteration in the character of the estate of a lunatic could affect the rights of his successors (*A.-G.* v. *M. of Ailesbury* (1887) L. R. 12 App. Ca. 672). But it appears now to be the practice to apply the doctrine of conversion to lunatics' estates; unless the order sanctioning the transaction expressly excludes it (*Re Gist* [1904] 1 Ch. 398; *Re Grange* [1907] 2 Ch. 20; *Re Searle* [1912] 2 Ch. 365). And with regard to infants and married women, the modern authorities appear to make it quite clear that, with the exception of the case in the text, an absolute order for sale by a duly qualified Court, even though made for a particular purpose only, works a conversion for all purposes (*Steed* v. *Preece* (1874) L. R. 18 Eq. 192; *Burgess* v. *Booth* [1908] 2 Ch. 648; *Fauntleroy* v. *Beebe* [1911] 2 Ch. 257).]

Options to purchase

2139. When the owner of real estate has conferred upon another person a binding option to purchase such real estate, the property will, for the purposes of § 2134, be deemed to be personal estate as from the time when such person has bound himself to exercise

the option, but not before.[a] Subject to § 2140, it makes no difference that the option is not exercised until after the death of the owner of the real estate.[b]

(a) *Lawes* v. *Bennett* (1785) 1 Cox, 167.
Ex parte Hardy (1861) 30 Beav. 206.
Re Isaacs [1894] 3 Ch. 506.

[Consequently, there can be no claim to back rents by the taker of the personal estate (*Townley* v. *Bedwell* (1808) 14 Ves. 591).]

(b) *Re Pyle* [1895] 1 Ch. 724.

[Presumably, the converse rule would apply in the conceivable but unlikely case of the owner of personalty creating an option to exchange it for real estate.]

'Reconversion'

2140. The rules stated in §§ 2134–2137 and 2139, *ante*, are subject to any expression of intention either by the settlor[a] or by any person who becomes absolutely entitled to the property in question under the provisions of the settlement.[b]

(a) *Phillips* v. *Phillips* (1832) 1 My. & K. 649.
Fitch v. *Weber* (1848) 6 Ha. 145.
Re Pyle [1895] 1 Ch. 724.
(b) *Re Glassington* [1906] 2 Ch. 305.
Re Grimthorpe [1908] 2 Ch. 675.
O'Grady v. *Wilmot* [1916] 2 A. C. 31.

[The latter process is sometimes spoken of as 'Reconversion'; but the term is ambiguous and not very useful. With regard to sales of real estate effected under statutory powers, it is not uncommon for the Acts to provide that the moneys realized shall be treated as real estate until they come into the hands of an absolute owner. Conspicuous examples are: s. 69 of the Lands Clauses Consolidation Act, 1845 (*Re Harrop's Estate* (1857) 3 Drew. 726; *Kelland* v. *Fulford* (1877) 6 Ch. D. 491); s. 34 of the Settled Estates Act, 1877; s. 22 (5) of the Settled Land Act, 1882; and s. 2 of the Land Transfer Act, 1897. On the other hand, a compulsory sale by a person *sui juris* under the Lands Clauses Consolidation Act,

even if the money is paid into Court under s. 76 of that Act, works a conversion for all purposes from the time that the price is fixed (*Manchester and Southport Railway Co.* (1854) 19 Beav. 365; *Re Harrop's Estate, ubi sup.*). The rule would appear to be different in the case of a compulsory sale on behalf of a person under disability (*Re Tugwell* (1884) 27 Ch. D. 309).]

Survival of choses in action

2141. In so far as rights arising out of contract and tort survive the contracting or injured party, they pass to, and can be enforced by, his personal representative.

[As a rule, rights arising out of contract survive the contracting party; but there are exceptions (*ante*, Bk. II, Pt. I, Sect. III, Tit. I, § 251). As a rule, the right to sue in tort does not survive the injured party; but the exceptions cover a wide ground (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI, § 787).]

Benefit of covenants running with the freehold

2142. The benefit of a covenant which runs with a freehold estate of inheritance (*ante*, Bk. III, Sect. III, Tit. II) passes to the personal representative as real estate till assent or conveyance to the heir or devisee.[a] Upon such assent or conveyance it passes to the heir or devisee,[b] even if the covenant has been broken in the life-time of the deceased, provided that substantial damage has ensued since the death.[c] If the deceased has been evicted in his lifetime, or suffered other substantial damage in respect of the land, the right to damages passes to the representative as personal estate.[d]

(a) Land Transfer Act, 1897, s. 1 (1).
Kingdon v. *Nottle* (1813) 1 M. & S. 355.
King v. *Jones* (1814) 5 Taunt. 418.

[In the case of a legal estate in land of copyhold tenure, the right to sue would doubtless pass direct to the heir or devisee.]

(b) Land Transfer Act, 1897, s. 3 (1).
Lougher v. *Williams* (1673) 2 Lev. 92 } (heir).
Sale v. *Kitchingham* (1713) 10 Mod. 158 }
Roe d. Bamford v. *Hayley* (1810) 12 East, 464 } (devisee).
Vyvyan v. *Arthur* (1823) 1 B. & C. 410 }
(c) *King* v. *Jones*, *ubi sup.*
(d) *Lucy* v. *Levington* (1671) 2 Lev. 26.
Kingdon v. *Nottle*, *ubi sup.*, at pp. 363–4, *per* Lord Ellenborough, C. J.

Representative may sue in either capacity

2143. If a representative, as such, enters into contracts,[a] or if torts are committed against the property of the deceased, after the latter's death,[b] and the benefit of such contracts, or the damages recoverable for such torts, would, when recovered, be assets of the deceased, the representative may sue upon such contracts or torts either in his representative or in his personal capacity, as he may think best.

(a) *Moseley* v. *Rendell* (1871) L. R. 6 Q. B. 338.
Abbott v. *Parfitt* (1871) *ibid.* 346.
(b) *Adams* v. *Cheverel* (1606) Cro. Jac. 113.
Hollis v. *Smith* (1808) 10 East, 293.

[The same principle applies to the recovery of assets of the deceased paid away by mistake (*Clark* v. *Hougham* (1823) 2 B. & C. 149).]

Survival of liabilities

2144. In so far as liabilities in contract and tort survive the contractor or tort-feasor, they pass to and can be enforced against his personal representative.[a] In respect of covenants the burden of which runs with the land at law, the heir or devisee is also liable

to the extent of assets received by him;[b] and in respect of covenants whereof the burden runs in equity, such persons are liable in manner and to the extent specified in Bk. III, Sect. III, Tit. II, § 1379, *ante*.

(a) Bk. II, Pt. I, Sect. III, Tit. I, §§ 249, 250, *ante*.
Bk. II, Pt. III, Sect. I, Tit. VI, § 787, *ante*.
(b) *Derisley* v. *Custance*, (1790) 4 T. R. 75 (heir).
Debts Recovery Act, 1830, ss. 2, 3 (devisees).

[As a rule, liabilities in contract do survive; but there are exceptions (*ante*, Bk. II, Pt. I, Sect. III, Tit. I, § 249). As a rule, liabilities in tort do not survive; but the exceptions cover a wide ground (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI, § 787, *ante*).]

Liabilities of lessor's representative

2145. The personal representative of a lessor is liable to the lessee, to the extent of assets, for all breaches of covenants in the lease committed by the lessor in his lifetime, including covenants which run with the reversion.[a] But if the lessor's real estate has been devised, liability for the breach of the obligations of the lessor incident to the relation of landlord and tenant falls, as amongst the persons entitled to his estate, primarily upon the devisee;[b] and (*semble*) the same rule applies in the case of real estate passing to the lessor's heir on intestacy.

(a) *Eccles* v. *Mills* [1898] A. C., at p. 371.
(b) *Mansel* v. *Norton* (1883) 22 Ch. D. 769.
Eccles v. *Mills*, *ubi sup.*, at pp. 371–2.

[Strange as it may appear, there seems to be little or no authority on the important question whether the liability for breaches of covenants running with the inheritance (not being a reversion) occurring

after the covenantor's death, falls upon the general personal estate or upon the persons taking the inheritance. On principle it should fall on the latter (see F. N. B. 145 E, note (a)).]

Liability of lessee's representative

2146. The personal representative of a lessee, whether or not such representative has entered upon the land demised, is liable to the lessor, to the extent of the assets of the deceased, for breaches of the stipulations contained in the lease, occurring either before or after the lessee's death ; and, subject to § 2148 *post*, he remains liable, although the premises have been assigned by the lessee[a] or by himself.[b] But the personal representative of an assignee of a lease does not remain liable for breaches occurring after a *bonâ fide* assignment by the deceased or himself;[c] and if the stipulations in the lease are onerous, it may be his duty to assign it.[d]

(a) *Brett* v. *Cumberland* (1617) Cro. Jac. 521.
(b) *Cogbill* v. *Freelove* (1691) 3 Mod. 325.
(c) *Pitcher* v. *Tovey* (1692) 4 Mod. 71.
(d) *Onslow* v. *Corrie* (1817) 2 Madd. 330.

[These rules are merely the consequences of the general principles as to liability on leases set out in Bk. III, Sect. I, Tit. VI, §§ 1146, 1148, *ante*.]

Personal liability of representative entering on land

2147. The personal representative of a lessee, if he has entered on the land demised, becomes liable personally to the lessor, irrespective of assets, for the future rent and upon future breaches of the stipulations in the lease, until he assigns the lease.[a] If the

estate is insolvent, his liability in respect of rent is limited to the yearly value of the premises;[b] but his liability for the breach of a covenant to repair is unlimited.[c]

(a) *Wollaston* v. *Hakewill* (1841) 3 Man. & Gr., at p. 320, *per* Tindal, C. J.

[It is for this reason that the personal representative can, before distributing the assets, claim to have a sum of money set apart to indemnify him against future liabilities which he may personally have incurred by taking possession, as an assign of the lessor (*Re Nixon* [1904] 1 Ch. 638). The representative of an assignee naturally gets rid of all liability for future breaches by assigning the lease (§ 2146, *ante*).]

(b) *Re Bowes* (1887) 37 Ch. D. 128.
Whitehead v. *Palmer* [1908] 1 K. B. 151.
(c) *Tremeere* v. *Morison* (1834) 1 Bing. N. C. 89.
Rendall v. *Andreæ* (1892) 61 L. J. (Q. B.) 630. (There appears to be no authority as to covenants other than covenants to repair.)

Statutory notices

2148. If a representative, liable as such for the rents or covenants in a lease, or for rent, covenants, or agreements contained in any conveyance on chief rent or rent charge, granted or assigned to the deceased, has satisfied all liabilities in these respects, and has set apart a sum sufficient to answer future liabilities in respect of any fixed sum agreed by the lessee or grantee to be laid out upon the property demised or conveyed, though the period for laying out the same has not arrived, and if he has assigned the lease or conveyed the property, he may distribute the residuary estate, and will then be under no further liability in respect of the lease or conveyance. But

the lessor or grantor may, in case further liabilities arise, follow the assets into the hands of those to whom they have been distributed.

Law of Property Amendment Act, 1859, ss. 27, 28.

[The right of the creditor to follow the assets after distribution is, however, purely equitable, and can only be exercised on equitable principles. Thus, if the creditor has induced the beneficiaries to believe that they might safely take the assets, his remedy against them will be gone (*Blake* v. *Gale* (1886) 32 Ch. D. 571); and, if he might have proved in the ordinary way before distribution, he will only be allowed to enforce his claim *pro ratâ* (*Gillespie* v. *Alexander* (1826) 3 Russ. 130). But, if he was unable to prove, he may sue any beneficiary, and leave adjustment to him (*Davies* v. *Nicolson* (1858) 2 De G. & J. 693); and mere delay, if satisfactorily explained, is no bar to his action (*Re Eustace* [1912] 1 Ch. 561).]

Liability of representative on shares

2149. The personal representative of a deceased shareholder is liable, to the extent of assets, to satisfy all obligations connected with the holding.[a] If the shares are transferred into his name on the register of shareholders of the company, he becomes a member of the company, and can be made personally liable, irrespective of assets, for calls subsequently becoming due thereon.[b] The personal representative can transfer the shares of the deceased without being registered as a shareholder.[c]

(a) *Baird's Case* (1870) L. R. 5 Ch. App., at p. 735.
(b) *Buchan's Case* (1879) L. R. 4 App. Ca. 549.
(c) Companies (Consolidation) Act, 1908, s. 29.

Liability of repre-

2150. The personal representative of a deceased partner is liable, to the extent of the deceased's assets,

sentative for partnership debts

after the deceased's separate debts have been paid, for the debts of the firm contracted while the deceased was a partner.

Partnership Act, 1890, s. 9.
Re Hodgson (1885) 31 Ch. D. 177.

[A limited partner's estate cannot be made liable for more than the capital contributed by him (Limited Partnership Act, 1907, s. 4 (2)).]

New liabilities incurred by representative

2151. If a personal representative incurs new liabilities in the execution of his office, he is personally liable to the creditors thereon, irrespective of assets. But if such liabilities were incurred by him in due course of administration, he may be sued in his representative capacity.

Ashby v. *Ashby* (1827) 7 B. & C. 444.

[For the representative's right of indemnity, see *post*, Tit. VIII, § 2213.]

TITLE IV — ASSETS

Definition

2152. Assets comprise all property passing on the death of a person to his personal representative, or to his heir, devisee, or special occupant (*ante*, Bk. III, Sect. I, Tit. IV, § 1082) which is in their hands liable for payment of the deceased's debts and legacies, or debts or legacies, or the claims of the next of kin of the deceased, in manner hereinafter described.

[Property which does not pass to the personal representative or heir on the death, e. g. property subject to a general power of appointment, *donationes mortis causâ*, and paraphernalia, may also be assets. As to these, see *ante*, Bk. III, Sect. VI, Tit. I, § 1464, and *post*, Tit. VI, § 2183 (X) and n.]

Limitation of liability of representatives

2153. The liability of the personal representative, as such, to pay the debts or legacies of the deceased is *primâ facie* limited to the amount of the assets which he has received or which but for his wilful default (*post*, Tit. VIII, § 2220 (ii)) he might have received.[a] And a plea that he has fully administered the assets is (subject to Tit. III, §§ 2147 and 2149, *ante*), if proved, a defence to any claim by a creditor or a legatee.[b] The liability of the heir, devisee, or special occupant is similarly limited.[c]

(a) Bl. *Comm.* II, 510.
(b) *Erving* v. *Peters* (1790) 3 T. R., at p. 688, *per* Lord Kenyon, C. J.
(c) Debts Recovery Act, 1830, ss. 6, 8.
Administration of Estates Act, 1833.
Wills Act, 1837, s. 6.

All property of deceased now assets

2154. All the property of a deceased person, whether real[a] or personal,[b] (other than estates tail (*ante*, Bk. III, Sect. I, Tit. III)), and property held by him in trust for other persons (*ante*, Bk. III, Sect. XVII) which passes to his personal representative, or to his heir, devisee, or special occupant, is assets, legal or equitable, for the payment of all his debts.

(a) Debts Recovery Act, 1830, ss. 3, 4, 6–8.
Administration of Estates Act, 1833.
Wills Act, 1837, s. 6.
Land Transfer Act, 1897, s. 2 (3).
(b) Sheppard, *Touchstone* (4th ed.) 455.
Bl. *Comm.* II, pp. 510–11.

[A fund over which the deceased had a general power of appointment is assets if the power is duly executed, directly or indirectly, by the deceased's will (see *ante*, Bk. III, Sect. VI, Tit. I, § 1465), but not otherwise (*Holmes* v. *Coghill* (1802) 7 Ves. 499).]

Legal personal assets

2155. All the property of a deceased person which, before the passing of the Land Transfer Act, 1897, vested in the personal representative *virtute officii*, is legal personal assets for the payment of the deceased's debts;[a] and his creditors can assert their claims in respect thereof either by a personal action against the representative,[b] or by an action for the administration of the estate.[c]

(a) *Cook* v. *Gregson* (1856) 3 Drew. 547.
Shee v. French (1857) *ibid.* 716.
A.-G. v. *Brunning* (1860) 8 H. L. C., at pp. 258–9, *per* Lord Cranworth.
(b) *Cook* v. *Gregson*, *ubi sup.*
(c) Chancery Procedure Act, 1852, s. 45.

[This property includes, in addition to chattels corporeal, and choses in action (*Shee* v. *French* (1857) 3 Drew. 716), equities of

redemption of chattel interests (*Cook* v. *Gregson*, *ubi sup.*) and, *à fortiori*, equitable personal estate generally, estates *pur autre vie* (Wills Act, 1837, s. 6), but not personalty subject to a general power of appointment exercised by the deceased's will (*O'Grady* v. *Wilmot* [1916] 2 A. C. 31.).]

Legal real assets

2156. Real estate which, under the Land Transfer Act, 1897, passes to the personal representative, is (probably) when it passes from the personal representative to the heir, devisee, or special occupant, legal real assets in their hands for the payment of specialty debts.[a] The specialty creditors of the deceased can assert their claims in respect of such assets by action against the heir,[b] devisee,[c] or special occupant, respectively;[d] and, if he has wholly or partially aliened or charged such assets before judgment in the creditors' action, the heir, devisee, or special occupant will remain liable to the extent of the assets so aliened or charged. But the creditors cannot enforce their rights against the estate in the hands of a *bonâ fide* alienee or incumbrancer.[e]

(a) Land Transfer Act, 1897, ss. 2 (3), 3 (1).

[Copyholds were never legal real assets, either at common law (*Brown's Case* (1581) 4 Rep. 22 a) or under the Statute of Fraudulent Devises, which merely enacted that creditors should not be deprived of their rights by a devise.]

(b) Statute of Frauds (1677) s. 10 (3).
Conveyancing Act, 1881, s. 59.
Co. Litt. 376 b.
Bl. *Comm.* II, 244.

(c) Debts Recovery Act, 1830, s. 4.

[This includes devisees of life interests, and of equitable interests (*Re Atkinson* [1908] 2 Ch., at p. 314, *per* Cozens-Hardy, M. R.).]

(d) Wills Act, 1837, s. 6.
(e) Debts Recovery Act, 1830, ss. 6, 8.
British Mutual Investment Co. v. *Smart* (1875) L. R. 10 Ch. App. 567.
Cary's & Lott's Contract [1901] 2 Ch. 463.
Re Atkinson, ubi sup.

[The rule as to the effect of alienation or charge by the heir or devisee is the same in respect of real estate made equitable assets by the Administration of Estates Act, 1833.]

Priority of debts against legal assets

2157. In the administration of legal assets, the debts of the deceased must be paid in the order specified in Tit. V, § 2161, *post;*[a] and the personal representative, other than a creditor administrator,[b] has the rights of preference and retainer specified in Tit. V, §§ 2165–2172, *post.* The heir or devisee has a similar right of retainer (? preference) in respect of specialty debts out of the legal real assets when they have come into his possession ;[c] unless the land is charged by the testator with the payment of his debts.[d]

(a) *Turner* v. *Cox* (1853) 8 Moo. P. C., at pp. 305–6.
(b) This exception is the result of the present form of the creditor administrator's bond (Practice Note, W. N. [1899] 262–3). For the older practice, see *Davies* v. *Parry* [1899] 1 Ch. 602 ; *Re Belham* [1901] 2 Ch. 52.
(c) *Re Illidge* (1884) 27 Ch. D., at pp. 482–3.

[Obviously this right cannot be exercised by the heir or devisee, so long as the land is in the hands of the personal representative; but there is nothing in the Land Transfer Act, 1897, to take it away from the heir or devisee after the land has passed to him. Is the right now extended to simple contract debts by *Re Samson* [1906] 2 Ch. 584 ?]

(d) *Re Illidge* (1883) 24 Ch. D., at p. 660, *per* Chitty, J.

Equitable assets

2158. Such of the assets of a deceased person as vest in his personal representative by virtue of the Land Transfer Act, 1897 (*ante*, Tit. III, § 2126) are (probably) equitable assets in the hands of such representative for the payment of the deceased's debts;[(a)] but the creditors of the deceased can (probably) assert their claims in respect of them either by an action for the administration of the estate, or, until such property has passed to the heir or devisee, by a personal action against the representative.[(b)] Assets which do not vest in the personal representative under the Land Transfer Act, 1897, or *virtute officii*, are equitable assets for payment of the deceased's debts;[(c)] and the creditors of the deceased can only assert their claim in respect of them by an action for the administration of the estate.[(d)]

(a) Land Transfer Act, 1897, s. 2 (3). (This would seem to be the result of the proviso to this sub-section.)
Re Williams [1904] 1 Ch. 52.
(b) Land Transfer Act, 1897, s. 2 (3).
(c) Administration of Estates Act, 1833.
(d) *Ibid.*
[The doubt which long existed as to the position of a fund over which the deceased has exercised a general power of appointment by his will has now been substantially resolved by the decision of the House of Lords in *O'Grady* v. *Wilmot* [1916] 2 A. C. 31.]

Order of debts against equitable assets

2159. In the administration of equitable assets, (*semble*) Crown debts and debts to which priority has been given by statute (*post*, Tit. V, §§ 2162, 2163) must be paid first; and debts incurred without valuable consideration are, unless they have been assigned

for value, postponed to debts incurred for value.[a] In other respects the debts of the deceased are payable *pari passu* out of equitable assets; and the personal representative has no right of retainer or *(semble)* preference in respect of such assets.[b]

(a) *Payne* v. *Mortimer* (1859) 4 De G. & J. 447.
(b) *Bain* v. *Sadler* (1871) L. R. 12 Eq. 570.
Re Baker (1890) 44 Ch. D., at p. 270, *per* Cotton, L. J.

[Moreover, if creditors who have resorted to legal assets afterwards claim to be paid out of equitable assets, their claims will only be admitted on terms of bringing into account the sums received by them out of the legal assets (*Sheppard* v. *Kent* (1702) 2 Vern. 435; *Deg* v. *Deg* (1727) 2 P. Wms. 412; *Haslewood* v. *Pope* (1734) 3 P. Wms. 322).]

Legatees no claim on real estate

2160. In the absence of provision to the contrary contained in the testament (*post*, (Tit. VI, §§ 2191–2192)), and subject to Tit. VI, § 2193, *post*, only the personal estate of the deceased is assets for the payment of legacies.

Robertson v. *Broadbent* (1883) L. R. 8 App. Ca., at p. 815, *per* Lord Selborne, C.

TITLE V — THE ORDER IN WHICH DEBTS ARE PAYABLE

Order against legal assets

2161. Subject to §§ 2162 and 2163, *post*, debts due from the deceased at his death are, *primâ facie*, payable out of his legal assets (*ante*, Tit. IV, §§ 2155, 2156) in the following order; that is to say, so long as any of the debts described in an earlier subparagraph remain unpaid, there can be no claim against such assets in respect of any debts described in a later: —

(i) debts due upon judgments recovered against the deceased in any Court of Record,[a] or upon orders made against him by a Court of Equity.[b] (*Semble*) the judgment creditor who first sues out execution is preferred;[c] but otherwise such debts are payable *pari passu*;[d]

(a) *Littleton* v. *Hibbins* (1600) Cro. Eliz. 793.
Searle v. *Lane* (1688) 2 Vern. 88.

[A County Court is a Court of Record (County Courts Act, 1888, s. 5).]

(b) *Searle* v. *Lane*, *ubi sup.*
Robinson v. *Tonge* (1735) 3 P. Wms., at p. 401 n. (This rule only applies to final orders; not to an order directing the taking of an account (*Smith* v. *Haskins* (1742) 2 Atk. 385).)

[The Law of Property Amendment Act, 1860, s. 3, deprived judgments of any preference unless they had been registered (see

Van Gheluive v. *Nerinckx* (1882) 21 Ch. D. 189); but this statute was repealed by the Land Charges Act, 1900, s. 5. Therefore it would appear that there is now no need to register for this purpose; unless the Interpretation Act, 1889, s. 38 (2) (a) prevents the revival of the old law. *Quære:* would a representative who paid an ordinary debt in ignorance of an unregistered judgment be liable to the judgment creditor on a devastavit? For the rights of a surety who has satisfied a judgment recovered against the deceased debtor, see *Re M'Myn* (1886) 33 Ch. D. 575.]

(c) Wentworth, *Executors* (4th edn.) 195.
(d) *Dollond* v. *Johnson* (1854) 2 Sm. & G., at p. 304.

[A foreign judgment ranks for this purpose as a simple contract debt (*Grant* v. *Easton* (1883) 13 Q. B. D. 302).]

(ii) debts due upon recognizances;

Pemberton v. *Barham* (1590) 4 Rep. 59 b.
Bereblock v. *Read, ibid.*
Bl. *Comm.* II, 511.

[Recognizances are conditional acknowledgments on record of debts which become payable if the condition is broken (Bl. *Comm.* II, 341). Recognizances, other than recognizances to the Crown (*post*, § 2162), are now extremely rare.]

(iii) debts due upon judgments recovered against the personal representative in respect of debts due from the deceased,[(a)] in order of date,[(b)] provided that such judgments have been pronounced before an order has been made for the administration of the estate by the Court;[(c)]

(a) *Re Williams' Estate* (1872) L. R. 15 Eq. 270.
(b) *Dollond* v. *Johnson* (1854) 2 Sm. & G. 301.
(c) *Paxton* v. *Douglas* (1803) 8 Ves. 520.
Re Stubbs' Estate (1878) 8 Ch. D. 154.

[The judgment gets no priority if it was obtained on the same day as the administration order (*Parker* v. *Ringham* (1864) 33 Beav. 535).]

(iv) specialty and simple contract debts, *pari passu*.

Administration of Estates Act, 1869.
Re Samson [1906] 2 Ch. 584.

[As previously stated (*ante*, Tit. IV, § 2159) all debts for valuable consideration, other than Crown debts and those to which preference is expressly given by statute, are payable *pari passu* out of equitable assets.]

Crown debts

2162. Except where the estate is being administered by the Court as an insolvent estate (*post*, § 2180),[a] debts due to the Crown take priority of all other debts of the deceased[b] (*semble*, as regards both legal and equitable assets).

(a) Judicature Act, 1875, s. 10.
Preferential Payments in Bankruptcy Act, 1888.
Bankruptcy Act, 1914, s. 151.

(b) Magna Carta (1225) 9 Hen. III, c. 18.
Littleton v. *Hibbins* (1600) Cro. Eliz. 793.
N. S. W. Taxation Commrs. v. *Palmer* [1907] A. C., at p. 182, *per* Lord Macnaghten.

[This appears to have been the rule for a long time as regards Crown debts of record and specialty. As regards Crown debts by simple contract, it is an inference from *Re Samson* [1906] 2 Ch. 584, and other similar cases, that the Administration of Estates Act, 1869, has placed specialty and simple contract debts on the same footing for all purposes of priority of payment out of the assets of a deceased debtor. (*Re Bentinck* [1897] 1 Ch. 673, must be regarded as overruled.) A surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority (*Re Churchill* (1888) 39 Ch. D. 174).]

Statutory preference

2163. Debts to which priority has been given by statute are payable before all other debts except Crown

debts (*semble*, out of both legal and equitable assets), e. g.: —

Poor Relief Act, 1743, s. 3.
Friendly Societies Act, 1834, s. 12.
Trustee Savings Banks Act, 1863, s. 14.
Regimental Debts Act, 1893, s. 2.
Friendly Societies Act, 1896, s. 35.

[*Semble*, these debts rank *inter se* rateably; but the statutes are silent on the point.]

Future and contingent liabilities

2164. The existence of future and contingent liabilities does not prevent creditors whose debts are presently due enforcing their claims.[a] But, if such liabilities exist and become debts, the personal representative will render himself personally liable to pay them, if, knowing of their existence,[b] he distributes the assets to the beneficiaries without satisfying them;[c] unless he distributes them under an administration order of the Court.[d]

(a) *Read* v. *Blunt* (1832) 5 Sim. 567.
Re Hargreaves (1890) 44 Ch. D. 236.
(b) *Re Fludyer* [1898] 2 Ch. 562.
(c) *Taylor* v. *Taylor* (1870) L. R. 10 Eq. 477. (As to his rights against the beneficiaries in such a case, see § 2182, *post*, and Tit. III, § 2148, n., *ante*.)
(d) *Re King* [1907] 1 Ch. 72.

[If the representative is unaware of the existence of such liabilities, he will be protected by notice issued under § 2182, *post*.]

Preference by representative

2165. A personal representative, other than a creditor administrator,[a] can, as between creditors of equal degree,[b] pay one in preference to another out

of the legal personal assets;[c] even though he knows that the other has begun an action for the enforcement of his debt.[d] But, after an order has been made for the administration of the estate by the Court,[e] or the appointment of a receiver,[f] this right cannot be exercised by the representative.

(a) Practice Note [1899] W. N. 262–3.
(b) Specialty and simple contract creditors are now regarded as of equal degree in this respect (*Re Orsmond* (1887) 58 L. T. 24; *Re Samson* [1906] 2 Ch. 584; *Re Harris* [1914] 2 Ch. 395).
(c) *Talbot* v. *Frere* (1878) 9 Ch. D., at pp. 570–1, *per* Jessel, M. R.

[Presumably the reasoning of *Re Williams* [1904] 1 Ch. 52, as to the right of retainer (*post*, § 2166), applies also to the right of preference.]

(d) *Vibart* v. *Coles* (1890) 24 Q. B. D. 364.
(e) *Davies* v. *Parry* [1899] 1 Ch., at p. 609. (The right is not lost by an order against the representative for an account (*Re Barrett* (1889) 43 Ch. D. 70).)
(f) *Re Radcliffe* (1878) 7 Ch. D., at p. 734.

Retainer by representative

2166. A personal representative, other than a creditor administrator,[a] or an executor *de son tort*,[b] can, as against creditors of equal degree,[c] and as against creditors of a higher degree of whose claims he has no notice,[d] retain, out of legal personal assets[e] actually or constructively in his possession,[f] a debt due to himself or his partnership firm[g] from the deceased;[h] whether the debt is due to him in his own right or as a trustee for another person.[i]

(a) Practice Note [1899] W. N. 262–3.
(b) *Coulter's Case* (1599) 5 Rep. 30 b.
Oxenham v. *Clapp* (1831) 2 B. & Ad., at pp. 313–5.

(c) Specialty and simple contract creditors are now regarded as of equal degree in this respect (*Re Samson* [1906] 2 Ch. 584; *Re Harris* [1914] 2 Ch. 395).

(d) *Re Fludyer* [1898] 2 Ch. 562. (The retainer must be made in good faith, and without undue haste (*ibid.*, at p. 565).)

(e) *Walters* v. *Walters* (1881) 18 Ch. D. 182.
Re Baker (1890) 44 Ch. D., at p. 272.
Re Williams [1904] 1 Ch. 52.

(f) *Pulman* v. *Meadows* [1901] 1 Ch. 233.
Re Beavan [1913] 2 Ch. 595.

[If the debt to the representative exceeds the amount of the assets, he can retain the assets in specie (*Re Gilbert* [1898] 1 Q. B. 282).]

(g) *Re Jennes* (1909) 53 Sol. Jo. 376.

(h) *Re Compton* (1885) 30 Ch. D., at p. 19, *per* Cotton, L. J.

[The debt must really be due to the representative himself, in his own or in another's right (*Wilson* v. *Wilson* [1911] 1 K. B. 327; *Re Duchess of Sutherland* [1914] 2 Ch. 720).]

(i) *Davies* v. *Parry* [1899] 1 Ch., at p. 607. (But a representative of a deceased sole trustee, in whom the trust estate is vested, but who has not agreed to act as trustee, cannot be compelled to exercise this right in respect of debts owing to the trust estate (*Re Ridley* [1904] 2 Ch. 774; *Re Benett* [1906] 1 Ch. 216).

[*Semble*, the heir or devisee in fee has a similar right of retainer in respect of his debt, out of any real estate vested in him (*Re Illidge* (1884) 27 Ch. D., at pp. 482–3 (heir); *Re Hayward* [1901] 1 Ch. 221 (devisee)); unless the real estate is charged with payment of debts. There would seem to be no ground for suggesting that this right has been abolished by the Land Transfer Act, 1897; but of course its importance has been greatly reduced by that statute.]

Retainer not stopped by administration order

2167. The right of retainer can be exercised even after an order for the administration of the estate has been made,[a] and out of (i) money paid into court, if the personal representative could have insisted upon the payment being made to himself,[b] and (ii) money

paid by the personal representative to a receiver,[c] or, if the estate is being administered in bankruptcy, to the official receiver.[d] It cannot be exercised out of money collected by a receiver[e] or the official receiver,[f] or out of money collected by the personal representative after he knows that an application for an order to administer the estate in bankruptcy has been made.[g]

(a) *Re Belham* [1901] 2 Ch. 52.
Re Ambler [1905] 1 Ch. 697.
(b) *Richmond* v. *White* (1879) 12 Ch. D. 361.
(c) *Re Harrison* (1886) 32 Ch. D. 395.
(d) *Re Rhoades* [1899] 2 Q. B. 347.
(e) *Re Harrison, ubi sup.*
(f) *Re Rhoades, ubi sup.*
(g) *Ibid.*, at p. 352.

[The right of retainer takes precedence of the costs of an administration action (*Richmond* v. *White*, *ubi sup.*).]

Debts which can be retained

2168. The right of retainer can be exercised in respect both of legal and of equitable debts,[a] and also in respect of claims for unliquidated damages[b] and other unascertained sums of money,[c] provided that they are ascertainable by a fixed standard. No right of retainer can be asserted in respect of sums not thus ascertainable,[d] nor in respect of equitable claims not in the nature of debts,[e] nor in respect of debts assigned by another creditor to the representative.[f]

(a) *Re Giles* [1896] 1 Ch. 956, as modified by *Re Beavan* [1913] 2 Ch., at pp. 600, 602.
(b) *Re Compton* (1885) 30 Ch. D. 15.

(c) *Re Morris's Estate* (1874) L. R. 10 Ch. App. 68.
(d) *Loane* v. *Casey* (1775) 2 Wm. Bl. 965.
(e) *Re Duchess of Sutherland* [1914] 2 Ch. 720.
(f) *Jones* v. *Evans* (1876) 2 Ch. D. 420.

Retainer by co-representatives

2169. A retainer by one of several co-representatives can only be exercised subject to the rights of his co-representatives; and the proceeds must be applied rateably amongst those entitled to retain.

Chapman v. *Turner* (1738–9) 9 Mod. 268.

[A representative appointed during the minority or lunacy of a person entitled to the grant can retain either for his own debt (*Briers* v. *Goddard* (1617) Hob. 250), or for that of the minor or lunatic (*Franks* v. *Cooper* (1799) 4 Ves. 763).]

Retainer after representative's death

2170. If a personal representative dies without having exercised his right of retainer, his representative cannot exercise such right, even though it was claimed during the personal representative's lifetime; unless the latter's representative is also a representative of the original testator.

Re Compton (1885) 30 Ch. D. 15.

Waiver of right to retain

2171. A personal representative can by his conduct waive his right of retainer;[a] and if a creditor of the deceased obtains a judgment against such representative in an action in which the right was not asserted, the representative cannot afterwards set up the right of retainer against the judgment.[b] He

does not lose it merely by failure to assert it, if the occasion to assert it has not arisen.[c]

(a) *Player* v. *Foxhall* (1826) 1 Russ. 538.
(b) *Re Marvin* [1905] 2 Ch. 490.
(c) *Re Rhoades* [1899] 2 Q. B., at p. 353.

Payment of statute barred debt

2172. A personal representative may pay, or retain in respect of, a debt as to which the Statutes of Limitation might be pleaded.[a] But he may not pay, or retain in respect of, a debt which is unenforceable by reason of non-compliance with the Statute of Frauds;[b] and he may not pay a debt after it has been declared by the Court to be statute-barred.[c]

(a) *Stahlschmidt* v. *Lett* (1853) 1 Sm. & G. 415.
(b) *Re Rownson* (1885) 29 Ch. D. 358.
(c) *Midgley* v. *Midgley* [1893] 3 Ch. 282.

[After an order for the administration of the estate, the defence of the Statutes of Limitation may be set up by any creditor or legatee (*Shewen* v. *Vanderhorst* (1831) 1 Russ. & My. 347); but not as against a creditor who is a plaintiff in the administration action (*Briggs* v. *Wilson* (1853) 5 De G. M. & G. 12; *Fuller* v. *Redman* (No. 2) (1859) 26 Beav. 614).]

Plea of statute by one of co-representatives

2173. If, in an action against co-representatives, one pleads the Statutes of Limitation, and the other or others do not, the Court accepts the plea;[a] but (possibly) one representative can (subject to § 2172, *ante*) pay a statute-barred debt against the wish of the others.[b]

(a) *Midgley* v. *Midgley* [1893] 3 Ch., at p. 302, *per* Lopes, L. J.
(b) *Ibid.*, at p. 297, *per* Lindley, L. J.
Astbury v. *Astbury* [1898] 2 Ch., at p. 115, *per* Stirling, J.

keeping alive of debt

2174. One of several co-representatives can prevent the Statutes of Limitation running in respect of a simple contract debt,[a] and (possibly) a specialty[b] debt, in favour of the personal estate of the deceased, by acknowledgment or promise in writing, and (probably) by payment on account of principal or interest.[c] Neither an acknowledgment or promise, nor a payment, by one representative will render the others personally liable for the debt;[d] but if the debt is charged on land, a part payment by one of several devisees of that land will prevent the statutes running in favour of any, so that they will all continue to be personally liable to pay it to the extent of assets received.[e] (*Semble*) a similar rule is applicable to a part payment by one of several co-representatives, made whilst the land is vested in them.[f]

(a) Statute of Frauds (Amendment) Act, 1828, s. 2.
Re Macdonald [1897] 2 Ch. 181.

(b) *Re Macdonald, ubi sup.*, at p. 187.

(c) *Coope* v. *Cresswell* (1866) L. R. 2 Ch. App., at pp. 123–4, *per* Lord Chelmsford.

(d) Statute of Frauds (Amendment) Act, 1828, s. 1.
Mercantile Law Amendment Act, 1856, s. 14.

[The result is, that if the co-representative pays away the assets without notice that the debt has been kept alive, he is not personally liable to the creditor (*Re Hollingshead* (1888) 37 Ch. D., at pp. 657–8; *Re Macdonald*, *ubi sup.*, at pp. 188–9).]

(e) *Re Lacey* [1907] 1 Ch. 330.

[S. 14 of the Mercantile Law Amendment Act does not apply to debts covered by the Real Property Limitation Act, 1874 (*Re Lacey*, *ubi sup.*, at p. 350).]

(f) This would seem to be the result of the Land Transfer Act, 1897, s. 3 (2).

[An acknowledgment by one of several devisees in trust is not sufficient to exclude the operation of the Real Property Limitation Act, 1833, s. 42 (1), and keep alive as against the land an obligation to pay rent, or interest in respect of money charged on land (*Astbury* v. *Astbury* [1898] 2 Ch. 111). *Semble*, this rule will apply to an acknowledgment by one of several co-representatives in whom land is vested under the Land Transfer Act, 1897.]

Acknowledgment by devisee in trust

2175. A personal representative to whom real estate has been devised in trust cannot prevent the Statutes of Limitation running in favour of the persons entitled to the real estate in respect of a debt payable out of the real estate, by making, in his capacity of representative, a payment or acknowledgment of or on account of the debt.[a] But, *semble*, a representative can keep a debt alive against real estate by an act done while it is vested in him as representative.[b]

(a) *Fordham* v. *Wallis* (1853) 10 Ha., 217. (It is otherwise if the land is vested in him beneficially (*ibid.*).)
Coope v. *Creswell* (1866) L. R. 2 Ch. App. 112.
Re Lacey [1907] 1 Ch., at pp. 344, 351–2.

[*Quære:* has this rule been affected by the Land Transfer Act, 1897, which vests the real estate in the personal representative?]

(b) Land Transfer Act, 1897, s. 1 (1).

Effect of trust or charge for payment of debts

2176. If a testator creates a trust for the payment of his debts out of his personal estate only, the periods of limitation in respect of such debts are not thereby affected.[a] But if he creates a trust or

charge for the payment of his debts out of his real estate,[b] or if, having created such a trust or charge, he directs his trustees to pay such debts out of a blended fund of realty and personalty,[c] the period of limitation in respect of simple contract debts thus affected is enlarged to twelve years.[d]

(a) *Scott* v. *Jones* (1835) 4 Cl. & Fin. 382.
(b) *Re Stephens* (1889) 43 Ch. D. 39. (The Land Transfer Act, 1897, has not altered the law on this point (*Re Balls* [1909] 1 Ch. 791).)
(c) *Re Raggi* [1913] 2 Ch. 206.

[*Quære:* would the period of limitation be extended as against the personalty?]

(d) Real Property Limitation Act, 1874, ss. 8, 10.

Running of Statutes of Limitation

2177. Against a creditor who had a complete cause of action before the decease of his debtor, the statutory period of limitation continues to run notwithstanding the decease.[a] Against a creditor whose cause of action is not complete till after his debtor's decease, the statutory period does not begin to run until the executor accepts office,[b] or, if there is no executor who accepts office, until a grant of administration is made.[c]

(a) *Boatwright* v. *Boatwright* (1873) L. R. 17 Eq. 71.
(b) *Douglas* v. *Forrest* (1828) 4 Bing. 686, at p. 704.
(c) *Burdick* v. *Garrick* (1870) L. R. 5 Ch. App., at p. 241.
Atkinson v. *Bradford Building Society* (1890) 25 Q. B. D. 377.

[The latter rule applies if the completion of the cause of action and the death occur on the same day; unless there is evidence that the cause of action accrued before the death (*Atkinson* v. *Bradford Building Society*, *ubi sup.*, at pp. 381–382).]

Insolvent estates

2178. If the estate of a deceased person is insolvent, it may be administered either — (i) by the personal representative out of Court, according to the law applicable to solvent estates;[a] or (ii) by the Court having jurisdiction in bankruptcy, in accordance with the law of bankruptcy;[b] or (iii) by the Chancery Division as an insolvent estate.[c] The Chancery Division may transfer the administration of an insolvent estate to the bankruptcy jurisdiction.[d]

(a) *Re Hargreaves* (1890) 44 Ch. D., at p. 242, *per* Lindley, L. J.
(b) Bankruptcy Act, 1914, s. 130.

[The petition may be presented either by a creditor or by the representative (*ibid.*).]

(c) Judicature Act, 1875, s. 10.
(d) Bankruptcy Act, 1914, s. 130 (3).
Re Baker (1890) 44 Ch. D. 262.
Re Eade (1906) 94 L. T. 277.

[The last decision sets out the considerations which will influence the Court in coming to a conclusion on this matter.]

Administration in Equity

2179. The Chancery Division may administer the estate of a deceased person as an insolvent estate, whenever there is good reason to suppose that such estate is not sufficient to pay the debts of the deceased,[a] together with the costs of administration.[b] And if there is any doubt as to whether or not the estate is solvent, the Court may direct an enquiry to ascertain the facts.[c]

(a) *Re Hopkins* (1881) 18 Ch. D., at p. 377.
(b) *Re Leng* [1895] 1 Ch. 652.
(c) *Re Smith* (1883) 22 Ch. D., at p. 592.

Effect of Judicature Act

2180. In the administration by the Chancery Division of an insolvent estate, the rules of bankruptcy law are applicable on the following subjects, viz.: —

(i) the respective rights of secured and unsecured creditors;

Judicature Act, 1875, s. 10.

[The Chancery rule allowed a creditor to realize or retain his security and to prove for the whole debt; provided that, by pursuing the two remedies open to him, he did not recover more than the total amount due (*Mason* v. *Bogg* (1837) 2 My. & Cr., at p. 448). Under the law of bankruptcy, he must, unless he gives up his security, either realize or value it, and prove only for the balance of the debt, if any (*Couldery* v. *Bartrum* (1881) 19 Ch. D., at pp. 400–401).]

(ii) the debts and liabilities provable;

Judicature Act, 1875, s. 10.
Re West of England Bank (1879) 12 Ch. D. 823.

[For the bankruptcy rules as to what debts and liabilities cannot be proved, see Bankruptcy Act, 1914, s. 30.]

(iii) the order in which such debts and liabilities are payable;

Judicature Act, 1875, s. 10.
Re Whitaker [1901] 1 Ch. 9.

[Generally in bankruptcy all debts and liabilities are payable *pari passu* (Bankruptcy Act, 1914, s. 33 (7)). But certain debts are preferred (*ibid.* s. 33 (1)); and these preferences admitted by the law of bankruptcy are now imported into the administration of an insolvent estate by the Chancery Division (Preferential Payments in Bankruptcy Act, 1888; *Re Leng* [1895] 1 Ch. 652; *Re Heywood* [1897] 2 Ch., at pp. 598–9). Apparently, a landlord's right of distress is not, in the Chancery Division, restricted by the bankruptcy rules (*Re Fryman* (1888) 38 Ch. D. 468); but it would seem that the Crown loses its priority (Bankruptcy Act, 1914, s.

151; *Re Whitaker* [1901] 1 Ch., at p. 14; notwithstanding *Re Oriental Bank* (1884) 28 Ch. D. 643, and *Re Churchill* (1888) 39 Ch. D. 174).]

(iv) the valuation of annuities and future and contingent liabilities.

Judicature Act, 1875, s. 10.

[For the bankruptcy rules on this point, see Bankruptcy Act, 1914, s. 30 (3).]

In other respects the general rules of administration, not the special rules of bankruptcy, apply.

Re Leng [1895] 1 Ch., at pp. 655–6.
Re Ambler [1905] 1 Ch. 697.

[These decisions were on the Bankruptcy Act, 1883; but the language of the corresponding provisions of the Act of 1914 is almost identical.]

Effect of Bankruptcy Act

2181. Even when the estate is being administered in the bankruptcy jurisdiction, the general rules of the law of property, and not the special rules of bankruptcy law which define the assets of a bankrupt, determine what are the assets of the deceased at the time of his death.[a] But in other respects, when the estate is being administered in bankruptcy, the assets are administered in accordance with the provisions of the Bankruptcy Acts relating to the administration of the property of a bankrupt, so far as the same are applicable.[b]

(a) *Re Gould* (1887) 19 Q. B. D. 92 (voluntary settlements).
Hasluck v. *Clark* [1899] 1 Q. B. 699 (execution).
Re Rhoades [1899] 2 Q. B. 347 (retainer).

[The decisions above quoted were all upon the Bankruptcy Act, 1883, s. 125; but the corresponding provisions (s. 130) of the Act of 1914 are on similar lines, and it is presumed that the decisions still apply.]

(b) Bankruptcy Act, 1914, s. 130 (5).

Distribution by representative

2182. If a personal representative has issued advertisements inviting creditors and others to send in their claims against the estate, similar to those issued by the Court in an action for administration, he may, at the expiration of the time fixed by the advertisements for sending in claims, distribute the assets amongst the persons entitled thereto, without incurring any liability to creditors of whose claims he had no notice at the time of the distribution.[a] But unpaid creditors and claimants may follow the assets into the hands of the persons who have received them.[b]

(a) It is immaterial that the creditor has not sent in his claim, if in fact the representative was aware of it (*Re Land Credit Co.* (1872) 21 W. R. 135).

(b) Law of Property Amendment Act, 1859, s. 29.

[As to the rules to be observed in following the assets, see *ante*, Tit. III, § 2148, n.]

TITLE VI—THE ORDER OF RESORT TO ASSETS

Order in which assets are applicable

2183. In the absence of provisions to the contrary contained in a testament, assets are, as between the different classes of beneficiaries, applicable to the payment of the deceased's unsecured debts in the following order:—

(i) personal estate undisposed of by testament;

Newbegin v. *Bell* (1857) 23 Beav. 386.
Re Grainger [1900] 2 Ch. 756.

[A lapsed share of a residuary bequest is not 'undisposed of' for this purpose (*Trethewy* v. *Helyar* (1876) 4 Ch. D. 53).]

(ii) personal estate expressly bequeathed [a] or conveyed [b] subject to, or in trust for, payment of debts;

(a) *Browne* v. *Groombridge* (1819) 4 Madd. 495 (trust).
Webb v. *De Beauvoisin* (1862) 31 Beav. 573 } (charge).
Re Smith [1913] 2 Ch. 216 }
(b) *Trott* v. *Buchanan* (1885) 28 Ch. D. 446 (trust).

(iii) general or residuary personal estate not specifically bequeathed nor exonerated nor exempted;

Manning v. *Spooner* (1796) 3 Ves., at p. 117.

[It is this rule which saves specific and demonstrative legacies (*ante*, Sect. I, Tit. IV, §§ 1998, 2003) from abatement until the funds available to satisfy general legacies have been exhausted.]

(iv) real estate appropriated to, or devised in trust for, the payment of debts;

Powis v. *Corbet* (1747) 3 Atk. 556.
Manning v. *Spooner* (1796) 3 Ves. 114.

[If the testator's intention to that effect is clear (*Burton* v. *Knowlton* (1796) 3 Ves. 106), but not otherwise (*Brummel* v. *Prothero* (1796) *ibid.* 110), real estate devised in trust for payment of debts may even be resorted to before the general personal estate.]

(v) real estate passing to the heir by inheritance,[a] including lapsed and disclaimed devises;[b]

(a) *Harmood* v. *Oglander* (1803) 8 Ves., at pp. 124–5.
Scott v. *Cumberland* (1874) L. R. 18 Eq. 578 (but see *Trethewy* v. *Helyar*, *ubi sup.*, at p. 57).
(b) *Re Sitwell* (1913) 57 Sol. Jo. 730.

[If devised land escheats to the Crown, it does not appear to be quite settled whether it ranks, for this purpose, as land descended or as land devised (*Evans* v. *Brown* (1842) 5 Beav., at pp. 122–3). The Land Transfer Act, 1897, does not affect the question; because it does not bind the Crown (*Goods of Hartley* [1899] P. 40).]

(vi) real estate charged with the payment of debts;

Harmood v. *Oglander*, *ubi sup.*, at p. 125.
Re Salt [1895] 2 Ch. 203.
Re Roberts [1902] 2 Ch. 834.

[This rule is not affected by the Land Transfer Act, 1897 (*Re Kempster* [1906] 1 Ch. 446).]

(vii) general pecuniary legacies (other than legacies charged on real estate) rateably;

Farquharson v. *Floyer* (1876) 3 Ch. D. 109.
Re Bawden [1894] 1 Ch. 693.

[Portions (*Re Saunders-Davies* (1887) 34 Ch. D. 482), and legacies (*Re Bawden* [1894] 1 Ch. 693), charged on real estate, do not contribute until after the real estate on which they are charged is exhausted.]

(viii) devises and specific legacies, rateably;

Tombs v. *Roch* (1846) 2 Coll. 490.
Powell v. *Riley* (1871) L. R. 12 Eq. 175.
Re Maddock [1902] 2 Ch., at p. 233.

(ix) real and personal estate over which a testator has a general testamentary power of appointment, which he has expressly exercised by his testament;

Fleming v. *Buchanan* (1853) 3 De G. M. & G. 976.
Beyfus v. *Lawley* [1903] A. C. 411.

[But the execution of such a power by a general bequest of personal property, as provided by the Wills Act, 1837, s. 27, causes the property to pass and to be applied in like manner as the residuary personal estate (*Williams* v. *Williams* [1900] 1 Ch. 152). *Quære:* whether an appointment by deed will make the fund assets (*Townsend* v. *Windham* (1750) 2 Ves. Sen., at p. 10).]

(x) widow's paraphernalia (*ante*, Bk. III, Sect. IX, Tit. II, § 1549),[a] and (*semble*) *donationes mortis causâ* (*ante*, Sect. I, Tit. IV, §§ 2040–2046)[b] rateably.

(a) *Tynt* v. *Tynt* (1729) 2 P. Wms. 542.
(b) *Tate* v. *Hilbert* (1793) 2 Ves. Jun., at p. 120.
Tate v. *Leithead* (1854) Kay, 658.

[There are clear *dicta* to the effect that *donationes mortis causâ* are liable for payment of debts in default of other assets; but the precise order in which they are resorted to does not appear to have been settled.]

Effect of charge of debts

2184. A charge of debts upon his real estate by a testator does not, in favour of his residuary legatees, though it does in favour of his pecuniary legatees,[a] exonerate his general personal estate from its primary

liability for debts; unless such general personal estate is expressly exonerated by him.[b] And if a testator creates a special fund for the payment of debts, and bequeaths out of his general personal estate legacies which fail to take effect by lapse or otherwise, the special fund will, *pro tanto*, be relieved from the liabilities specially charged upon it.[c]

(a) *Re Salt* [1895] 2 Ch. 203.
Re Roberts [1902] 2 Ch. 834.
(b) *Bootle* v. *Blundell* (1815) 1 Mer., at pp. 220–221, *per* Lord Eldon, C.
Allan v. *Gott* (1872) L. R. 7 Ch. App., at pp. 442–443.
Kilford v. *Blaney* (1885) 31 Ch. D., at p. 61.

[The rule applies, even if the real estate is outside the jurisdiction of the Court (*Re Smith* [1913] 2 Ch. 216).]

(c) *Dacre* v. *Patrickson* (1860) 1 Dr. & Sm. 182.
Kilford v. *Blaney* (1885) 31 Ch. D. 56.

Effect of creating a 'mixed fund'

2185. If a testator creates a mixed fund of real and personal estate, and directs that all or a certain number of his debts shall be paid thereout, the residuary bequest (if any) is wholly or *pro tanto* discharged from liability for such debts. And, as between the different properties comprised in such mixed fund, the debts will be apportioned rateably.

Roberts v. *Walker* (1830) 1 Russ. & M. 752.

Incumbrances

2186. Liabilities incident to any particular asset which fall due after the owner's decease,[a] and charges upon any particular asset neither created[b] nor adopted

as his own [c] by the deceased, are borne by the beneficiary entitled to that asset. But liabilities arising under a contract made by the deceased, though for the benefit of any particular asset, are (subject to §§ 2188 and 2189, *post*) primarily borne by the deceased's general personal estate.[d]

(a) *Fitz Williams* v. *Kelly* (1852) 10 Ha. 266 (fines due on a lease).
Addams v. *Ferick* (1859) 26 Beav. 384 (calls on shares).
Re Betty [1899] 1 Ch. 821 (obligations under a lease).
(b) *Swainson* v. *Swainson* (1856) 6 De G. M. & G. 648.
(c) *Townshend* v. *Mostyn* (1858) 26 Beav. 72.

[It is on this principle that the cost of up-keep of a specific legacy after the testator's death falls on the specific legatee (*Re Pearce* [1909] 1 Ch. 819; *ante*, Sect. I, Tit. IV, § 2009).]

(d) *Cooper* v. *Jarman* (1860) L. R. 3 Eq. 98.
Re Day [1898] 2 Ch. 510.

Charge on specific legacy

2187. A charge created by a testator upon chattels personal specifically bequeathed, is primarily borne by the general personal estate not specifically bequeathed.[a] But if such estate is insufficient for the payment of the testator's debts, the legatee of the property charged must, as between himself and other specific legatees or devisees, in the absence of direction to the contrary in the testament, bear the burden of the charge.[b]

(a) *Lewis* v. *Lewis* (1871) L. R. 13 Eq., at pp. 225–6.
Bothamley v. *Sherson* (1875) L. R. 20 Eq. 304, at pp. 315–6.
(b) *Re Butler* [1894] 3 Ch. 250.

[A mere direction for payment of debts is not evidence of a contrary intention for this purpose (*Re Butler*, *ubi sup.*).]

Charges on land

2188. The liability to pay or satisfy a mortgage, an equitable lien for unpaid purchase money, or other equitable charge created by a deceased person upon real estate or chattels real,[a] is, as between the devisee or legatee of such property,[b] or the heir of such person taking such property by intestacy, and his other devisees, legatees, heirs, or his next of kin,[c] borne primarily by the devisee, legatee, or heir taking the property so charged,[d] unless a contrary intention has been declared by the deceased in his testament, deed, or other document.[e] But the person taking the property subject to such mortgage, lien, or charge, does not become personally liable to pay the debt charged thereon.[f]

(a) *Re Kershaw* (1888) 37 Ch. D. 674.
(b) *Re Anthony* [1893] 3 Ch. 498.
(c) *Re Fraser* [1904] 1 Ch., at p. 735.
(d) Real Estate Charges Acts, 1854, 1867, 1877.
(e) *Ibid.*
Re Campbell [1893] 2 Ch., at pp. 214–5.
(f) *Syer* v. *Gladstone* (1885) 30 Ch. D. 614.

[A general charge of debts or legacies by the deceased's testament is not within the meaning of this § (*Hepworth* v. *Hill* (1862) 30 Beav. 476).]

'Contrary intention'

2189. Neither a general direction given by a testator that his debts shall be paid out of his personal estate,[a] nor a charge of, or direction for, payment of debts upon or out of residuary real or personal estate or residuary real estate,[b] is a declaration of a contrary intention within the meaning of § 2188,

ante. In order that § 2188 may be excluded, it must appear that the deceased has either expressly, or by necessary implication, referred to the debts secured by mortgage, lien, or charge, and directed them to be discharged out of his general personal estate.[c]

(a) Real Estate Charges Act, 1867, s. 1.
(b) Real Estate Charges Act, 1877, s. 1.
(c) *Re Valpy* [1906] 1 Ch. 531.

[The right of a pecuniary legatee to payment of his legacy was, in equity, before the passing of the Real Estate Charges Acts, prior to the right of a devisee of mortgaged land to have the mortgage debt paid out of the personalty; and this rule still holds good (*Re Fry* [1912] 2 Ch. 86). Therefore, the fact that these Acts are excluded by the testament does not deprive the legatee of his priority (*Re Smith* [1899] 1 Ch., at pp. 371–3).]

Charges of legacies

2190. The provisions of §§ 2184 and 2185 relating to the payment of debts charged upon real estate[a] or payable out of a mixed fund,[b] apply, *mutatis mutandis*, to legacies similarly so charged or payable.

(a) *Elliott* v. *Dearsley* (1880) 16 Ch. D. 322.
Kilford v. *Blaney* (1885) 31 Ch. D. 56.
Re Boards [1895] 1 Ch. 499.
(b) *Allan* v. *Gott* (1872) 7 Ch. App. 439.
Re Spencer Cooper [1908] 1 Ch. 130.

Legatees no primâ facie *claim on real estate*

2191. In the absence of special direction in the testament, and subject to §§ 2192 and 2193, *post*, a legatee has no claim upon the real estate of the deceased.[a] But a testator may make his real estate, or

any other fund, primarily or exclusively liable to the payment of legacies.[b]

(a) *Robertson* v. *Broadbent* (1883) L. R. 8 App. Ca., at p. 815, *per* Lord Selborne, C.

[*Semble*, this rule has not been affected by the passing of the Land Transfer Act, 1897 (see s. 2 (3) of that Act).]

(b) *Dickin* v. *Edwards* (1844) 4 Ha. 272.

[If, however, in the last case, the testator evinces an intention that the legacies shall in any event be paid, the legatees will, in the event of the fund primarily liable proving insufficient, be entitled to have recourse to the general personal estate (*Dickin* v. *Edwards*, *ubi sup.*, at p. 276).]

Implied charge of debts or legacies

2192. If a testator directs payment of his debts, or bequeaths pecuniary legacies, and the direction or bequest is either followed or preceded by a gift of the residue of his real and personal estate, the debts or legacies are charged upon his real estate.

Greville v. *Browne* (1859) 7 H. L. C. 689.
Re Salt [1895] 2 Ch. 203.
Re Balls [1909] 1 Ch. 791, at p. 795.

[The word "residue" need not be used if the meaning of the testator is otherwise clear (*Re Balls*, *ubi sup.*; *Re Bawden* [1894] 1 Ch. 693).]

'Marshalling'

2193. If, by the action of a creditor, the order of resort to the assets of a deceased person for payment of debts (*ante*, § 2183) has been disturbed, a

beneficiary who has suffered by such disturbance can claim to stand in the place of the creditor, and to obtain satisfaction from the fund primarily liable for the debt, to the extent to which the fund out of which the beneficiary has a *primâ facie* claim to satisfaction has been depleted.

Aldrich v. *Cooper* (1803) 8 Ves., at pp. 394–7, *per* Lord Eldon, C.
Trimmer v. *Baynes* (1803) 9 Ves., at p. 211, *per* Grant, M. R.

Thus: —

(i) if a creditor obtains payment of his debt from the personal estate of the deceased, a pecuniary legatee can, to the extent of such payment, enforce his claims against the real estate descended,[a] or real estate charged with the payment of debts;[b]

(a) *Galton* v. *Hancock* (1743) 2 Atk. 427.
Aldrich v. *Cooper* (1803) *ubi sup.*, at p. 396.
(b) *Strickland* v. *Strickland* (1839) 10 Sim. 374.
Paterson v. *Scott* (1852) 1 De G. M. & G. 531.

[A charge of debts on real estate can be indirectly created in manner described in § 2192, *ante* (*Re Salt* [1895] 2 Ch. 203).]

(ii) a specific legatee, whose legacy has been taken for payment of debts, can to that extent enforce his claims, not only against the real estate descended or charged, but against the general personal estate,[a] and also against the real estate devised, but not charged with debts, in the proportion which the value of the personal estate

specifically bequeathed to him bears to the realty devised;[b]

(a) *Bothamley* v. *Sherson* (1875) L. R. 20 Eq. 304.
(b) *Re Saunders-Davies* (1887) 34 Ch. D. 482.

[A devisee (including a residuary devisee (*ante*, Sect. I, Tit. IV, § 2001)) would have a similar claim to contribution against a specific legatee (*Re Saunders-Davies*, *ubi sup.*, at p. 495).]

(iii) if a legatee, whose legacy is charged by the testament on the real estate of the testator, obtains payment from the personal estate, a legatee whose legacy is not so charged can, to the extent of such payment, enforce his claims against the real estate;

Scales v. *Collins* (1852) 9 Ha. 656.

(iv) a widow, whose paraphernalia have been employed in the payment of her deceased husband's debts, can, to the extent of such employment, enforce her claims against his general personal estate,[a] his real estate undisposed of by his testament,[b] his real estate charged with the payment of debts,[c] and (*semble*) his real estate devised.[d]

(a) *Tynt* v. *Tynt* (1729) 2 P. Wms. 542.
(b) *Tipping* v. *Tipping* (1729) 1 P. Wms. 730.
Snelson v. *Corbet* (1746) 3 Atk. 369.
(c) *Incledon* v. *Northcote* (1746) *ibid.* 430.
Boyntun v. *Boyntun* (1784) 1 Cox, Eq. 106.
(d) *Tynt* v. *Tynt*, *ubi sup.*

[The doubt is caused by the later decision of *Probert* v. *Clifford* (1739) 1 Ambl. 6, where Lord Hardwicke, C., apparently unaware

of the earlier case, refused to allow a widow to marshal against devisees; saying that a husband had power to dispose of his wife's paraphernalia during his lifetime. But the reasoning of *Tynt* v. *Tynt*, that a devisee cannot be in a better position than an heir, seems to have been subsequently followed. At any rate it would seem that, inasmuch as the widow is in the position of a simple contract creditor in respect of her paraphernalia (*Townsend* v. *Windham* (1750) 2 Ves. Sen., at p. 7, *per* Lord Hardwicke, C.), she ought, since the passing of the Administration of Estates Act, 1833, to be preferred to the devisees.]

MARSHALLING BY CREDITORS

Formerly the doctrine of marshalling assets was almost more inportant for creditors than for beneficiaries; but, owing to the operation of the Administration of Estates Act, 1869, which placed specialty and simple contract debts on the same footing, its importance to creditors has practically disappeared. Still, it may conceivably apply to them; as, for instance, when judgment or other creditors (*ante*, Tit. V, § 2161) have absorbed the whole of the legal assets, and claim to come upon the equitable (*ante*, Tit. IV, § 2159). And, *inter vivos*, the doctrine may apply to secured creditors (*ante*, Bk. III, Sect. IV, Tit. II, § 1421).

TITLE VII — DUTIES AND POWERS OF THE PERSONAL REPRESENTATIVE

Burial of deceased

2194. An executor has the custody of the body of the deceased until its burial or cremation,[a] and is not obliged to obey the directions given by the deceased as to its disposal.[b] He must bury or cremate it[c] in a manner suitable to the amount of the deceased's assets and station in life.[d] The purchase of mourning garments for the use of the deceased's relatives is not a part of the funeral expenses which the executor may incur.[e]

(a) *Williams* v. *Williams* (1882) 20 Ch. D., at p. 664, *per* Kay, J.

[As to cremation, see *R.* v. *Price* (1884) 12 Q. B. D. 247, and the Cremation Act, 1902.]

(b) *Williams* v. *Williams, ubi sup.*, at p. 665.
(c) *Sharp* v. *Lush* (1879) 10 Ch. D., at p. 472.
(d) *Hancock* v. *Podmore* (1830) 1 B. & Ad. 260.
Edwards v. *Edwards* (1834) 2 Cr. & M. 612.
(e) *Johnson* v. *Baker* (1825) 2 C. & P. 207.
Bridge v. *Brown* (1843) 2 Yo. & C. Ch. Ca. 181.

[*Semble*, as between the personal representative and the beneficiaries, a direction to furnish mourning garments, or to erect a tombstone, would be binding as a legacy.]

Inventory of estate

2195. The personal representative must make and produce an inventory of the deceased's estate, if re-

quired to do so by the Court upon the application of any one interested in the estate.

21 Hen. VIII (1529) c. 5, s. 2.

[In practice, the representative never exhibits the inventory unless he is called upon to do so (*Myddleton* v. *Rushout* (1797) 1 Phill. 244; *Phillips* v. *Bignall* (1811) 1 Phill. at p. 240). The place of the inventory is taken by the accounts rendered by the personal representative to the Inland Revenue authorities for the purpose of assessing the Death Duties.]

Realization of assets

2196. The personal representative must collect and realize the estate of the deceased within a time which is, in the circumstances of the estate, reasonable.[a] He must call in unsecured debts due to the estate;[b] but he need not call in a debt secured upon apparently adequate real security.[c] He is not liable for failure to secure payment, if he has done all he could to obtain it.[d]

(a) *Grayburn* v. *Clarkson* (1868) L. R. 3 Ch. App., at p. 606.

[*Primâ facie*, a year is a reasonable time; and if the representative takes longer, the onus is on him to justify the delay (*ibid.*).]

(b) *Powell* v. *Evans* (1801) 5 Ves., at p. 844.
(c) *Re Chapman* [1896] 2 Ch., at p. 778.

[By virtue of s. 30 of the Conveyancing Act, 1881, a personal representative of a mortgagee can now re-convey mortgaged property to the mortgagor upon redemption, even though it consists of real estate; and, by the effect of s. 21 (4) of the same statute, he can exercise the statutory power of sale given to a mortgagee by the Act.]

(d) *Clack* v. *Holland* (1854) 19 Beav., at pp. 271–2.

[Even if he takes no steps to enforce payment, the representative may escape liability, if he can show that he had reasonable grounds

for belief that such steps would have been ineffectual (*ibid.*). But in such a case the onus of proof is on him (*Re Brogden* (1888) 38 Ch. D., at p. 568).]

No duty to invest

2197. In the absence of directions to the contrary in the testament, the personal representative is not obliged to invest the deceased's money;[a] but, if he leaves it at a bank, he must keep it on a separate account.[b]

(a) *Johnson* v. *Newton* (1853) 11 Ha. 160.
(b) *Wilks* v. *Groom* (1856) 25 L. J. Ch., at p. 729.

[This is an important point in which a personal representative differs from a trustee (*ante*, Bk. III, Sect. XVII, Tit. III, §§ 1785, 1794).]

Application of Trustee Acts

2198. The provisions of the Trustee Acts applicable to trustees are applicable also to the duties incident to the office of the representative of a deceased person.

Trustee Act, 1893, s. 50.
Dowse v. *Gorton* [1891] A. C., at p. 204, *per* Lord Macnaghten.

[For particulars of these provisions, see *ante*, Bk. III, Sect. XVII, Tit. III.]

Management of property

2199. If any of the property of the deceased cannot be at once realized, the personal representative has the powers of management necessary to maintain its value.

Strickland v. *Symons* (1883) 22 Ch. D., at p. 671.

[The principle is necessarily vague; but the illustration given in the case quoted is that of a ship which is allowed by the representative to complete her voyage, or upon which money is expended to enable her to earn freight. The most striking illustration of the principle is, however, that described in the next §.]

Carrying on deceased's business

2200. The representative may carry on a business belonging to the deceased with a view to winding it up[(a)] or of selling it as a going concern.[(b)] If authorized by the testator, he may (as between himself and the beneficiaries) carry it on for an indefinite period;[(c)] but none of the assets may be invested in it without the testator's authority,[(d)] and, if such authority is given, the amount invested must not exceed that authorized.[(e)]

(a) *Collinson* v. *Lister* (1855) 20 Beav. 356.
(b) *Dowse* v. *Gorton* [1891] A. C., at p. 199, *per* Lord Herschell.
O'Neill v. *McGrorty* [1915] 1 Ir. R., at p. 17, *per* O'Connor, M. R.
(c) *Re Chancellor* (1894) 26 Ch. D. 42.
Re Crowther [1895] 2 Ch. 56.
Re Oxley [1914] 1 Ch. 613.

[In *Collinson* v. *Lister*, *ubi sup.*, it is laid down that the business can only be carried on for the purpose of winding up. But in *Dowse* v. *Gorton*, *ubi sup.*, at p. 199, Lord Herschell says that it can also be carried on (even as against the creditors) with a view to its sale as a going concern. In such a case, however, the business can only be carried on for a time which is in the circumstances reasonable (*Re Smith* [1896] 1 Ch. 171).]

(d) *Re Hodson* (1818) 3 Madd. 138.
Cutbush v. *Cutbush* (1839) 1 Beav. 184.
M'Neillie v. *Acton* (1853) 4 De G. M. & G. 744.
(e) *Ex parte Garland* (1804) 10 Ves., at p. 120.

[Of course in any case the representative is bound to complete pending contracts entered into by the deceased (*Marshall* v. *Broadhurst* (1831) 1 Cr. & J. 403). But, *semble*, such completion may

be a preference (*ante*, Tit. V, § 2165). For the effect of carrying on a business upon the rights of beneficiaries and creditors, see *post*, Tit. VIII, §§ 2214–2216.]

Powers of disposition

2201. The personal representative has, for the purpose of duly administering the assets, the power to sell, mortgage, or pledge the real and personal estate vested in him;[a] and neither creditor,[b] beneficiary,[c] nor co-representative[d] can, *primâ facie*, impeach the title of the purchaser, mortgagee, or pledgee from or of the representative.

(a) Land Transfer Act, 1897, s. 1.
Nugent v. *Gifford* (1738) 1 Atk. 463.
Mead v. *Lord Orrery* (1745) 3 Atk., at p. 337, *per* Lord Hardwicke, C.
Scott v. *Tyler* (1788) 2 Dick., at p. 725, *per* Lord Thurlow, C.
(b) *Nugent* v. *Gifford*, *ubi sup.*
Mead v. *Lord Orrery*, *ubi sup.*
Whale v. *Booth* (1785) 4 T. R. 625, n., *per* Lord Mansfield, C. J.
(c) *Ewer* v. *Corbet* (1723) 2 P. Wms. 148.
Medd v. *Lord Orrery*, *ubi sup.*
(d) *McLeod* v. *Drummond* (1805) 14 Ves. 353; 17 Ves. 152.
Attenborough v. *Solomon* [1913] A. C., at p. 83, *per* Lord Haldane, C.

But the sale, mortgage, or pledge can be set aside if: —

(i) the person seeking to set it aside can prove that the purchaser, mortgagee, or pledgee knew that it was made fraudulently, or otherwise than in a due course of administration,[a] or that it was made without valuable consideration, or for an illusory consideration;[b]

(a) *Scott* v. *Tyler*, *ubi sup.*, at p. 724.
McLeod v. *Drummond* (1811) 17 Ves., at p. 170, *per* Lord Eldon, C.

(b) *Scott* v. *Tyler*, *ubi sup.*, at pp. 725–6, *per* Lord Thurlow, C. *Rice* v. *Gordon* (1847) 11 Beav. 265, 270.

[It is on this principle that a sale or pledge of the assets by the representative to satisfy his private debt is invalid when the facts are known to the purchaser or pledgee (*Re Morgan* (1881) 18 Ch. D., at p. 98, *per* Fry, J.).]

or —

(ii) the representative creates a merely equitable charge upon the deceased's property for his own purposes, even in favour of a person who had no notice that he was dealing with a representative.

Re Morgan (1881) 18 Ch. D. 93.

Powers of single representative

2202. Any one of several co-representatives can give a good legal title to any part of the personal estate of the deceased.

Cole v. *Miles* (1852) 10 Ha. 179.

[But if one of several co-representatives, after he has ceased to own any part of the estate as representative, and has begun to own it as trustee, sells or pledges it without the assent of his co-trustee, the transaction can be set aside as against the purchaser or pledgee (*Attenborough* v. *Solomon* [1913] A. C. 76).]

But: —

(i) the consent of all the executors who prove the testament is necessary to the disposition of any part of the real estate of a testator;

Land Transfer Act, 1897, s. 2 (2).
Conveyancing Act, 1911, s. 12.

[It may be noted also that the transfer of shares in limited and other companies, and of stock registered in the books of the Bank

of England, is governed by special rules (Companies (Consolidation) Act, 1908, s. 22 (1); National Debt Act, 1870, s. 23).]

(ii) the Court may refuse to enforce an equitable claim founded on an act done by one representative against the wish of his co-representatives;

Lepard v. *Vernon* (1813) 2 V. & B. 51.
Sneesby v. *Thorne* (1855) 7 De G. M. & G. 399.
Re Ingham [1893] 1 Ch., at p. 360.

(iii) one representative cannot, without the sanction of the Court, sell any part of the assets to another.

Re Norrington (1879) 13 Ch. D. 654.

Legatee also a representative

2203. The fact that a legatee is also a personal representative of the testator does not prevent him giving a good title as legatee to a purchaser for valuable consideration, provided that—

(i) the purchaser has no notice of any debts of the testator remaining unpaid; and

(ii) the circumstances are such that the purchaser is entitled to assume an assent by the personal representative to the legacy; and

Graham v. *Drummond* [1896] 1 Ch. 968.

(iii) the property purchased does not remain under the control of the representative[a]

or the Court[b] for the purpose of administering the estate of the testator.

(a) *Noble* v. *Brett* (1858) 24 Beav. 499.
(b) *Hooper* v. *Smart* (1875) 1 Ch. D. 90.

[*Semble*, the same principle would apply to an alienation by a devisee who was also a personal representative.]

Sale of real estate not vested in representative

2204. Where a testator has charged his real estate, or any specific portion thereof, with the payment of debts or legacies or other specific sum of money, and has not devised the whole of his interest in such real estate to trustees, or to any persons charged with the payment of debts or legacies, nor made any express provision for the raising of such sum, the executor or executors for the time being named in his testament, and any persons in whom the executorship for the time being becomes vested, may raise such debts, legacies or sum by sale or mortgage of such real estate, as they may think proper.

Law of Property Amendment Act, 1859, ss. 14, 16, 18.

[Before the passing of the above Act, the personal representative, as such, had nothing to do with the deceased's real estate; and, even since the passing of the Land Transfer Act, 1897, the legal estate in copyholds does not vest in him as such. The law, therefore, as to the circumstances under which the executor might be able to deal with real estate not vested in him by operation of law, though much diminished in importance, still applies (subject to the Act of 1859) to the legal estate in copyholds. It may be summarized as follows:

(i) A testator might by his testament expressly give his executors a power to sell, without giving them any estate in the land (*Doe d. Hampton* v. *Shotter* (1838) 9 A. & E. 905). Till the exercise of

such a power, the estate vested in the heir or devisee (*Warneford* v. *Thompson* (1797) 3 Ves. 513). The power could be exercised by the executors who had proved, without the concurrence of those who had renounced (21 Hen. VIII (1529) c. 4); but it was not exercisable by an administrator (*Re Clay and Tetley* (1880) 16 Ch. D. 3).

(ii) A testator might have devised an estate in the land to his executors on trust to fulfil certain purposes (Co. Litt. 113 a). If the land so devised was charged with the payment of debts and legacies, the purchasers were not bound to see to the application of the purchase money; but if it was charged with the payment of legacies only, they were so bound (*Johnson* v. *Kennett* (1835) 3 My. & K., at p. 630; *Re Henson* [1908] 2 Ch. 356).

(iii) A testator might have given his executors power by implication to deal with his real estate. Thus a direction in the will that such real estate should be sold or mortgaged gave the executors power to sell or mortgage if the purchase or mortgage money was distributable by them (*Curtis* v. *Fulbrook* (1849) 8 Ha. 278). But, though a general charge of debts on the real estate might give the executors an implied power of sale (*Sissons* v. *Chichester* [1916] 2 Ch. 75), a devise to trustees on a trust to pay debts would negative such implied power (*Colyer* v. *Finch* (1856) 5 H. L. C., at p. 922, *per* Lord Cranworth, C.).

To obviate difficulties which arose as to these implied powers, the provision in the text was made by the Law of Property Amendment Act, 1859. The powers given by that statute do not apply if the lands have been devised in fee or in tail to a devisee charged with debts or legacies (s. 18); but this exception only covers an immediate devise, and not an executory devise which does not take effect immediately on the death (*Barrow-in-Furness Corporation and Rawlinson's Contract* [1903] 1 Ch. 339). Having regard to the expressions of the Court in *Re Clay and Tetley*, *ubi sup.*, it seems probable neither the statutory nor the other powers above described can be exercised by an administrator.]

Underleases by a representative

2205. A personal representative may grant an underlease of the leasehold property of the deceased, but only if this course is necessary for the due administration of the estate; and the underlessee only

gets a good title if in fact it was necessary to make the underlease. The representative cannot give the underlessee an option to purchase at a future time.

Oceanic Steam Navigation Co. v. *Sutherberry* (1880) 16 Ch. D. 236.

[*Semble*, since the passing of the Land Transfer Act, 1897, the same principle will apply to leases of real estate.]

Allowance of claims and compromises

2206. Subject to the directions of the testament (if any), a personal representative may pay or allow any debt or claim against the deceased's estate on any evidence that he thinks sufficient;[a] and he has the powers with regard to accepting a compromise of a claim by the estate described in Bk. III, Sect. XVII, Tit. IV, § 1807.[b] He may (possibly) compromise the claim of a co-representative against the estate; provided that such a compromise is beneficial to the estate.[c] But a compromise made between co-representatives as to the claim of one of them will not bar the rights of those interested in the estate to investigate the accounts.[d]

(a) Trustee Act, 1893, ss. 21 (1), 50.
(b) *Ibid.* ss. 21 (2), 50.
(c) *Re Houghton* [1904] 1 Ch. 622.

[But see the remarks of Lord Eldon in *Cooke* v. *Collingridge* (1823) Jac., at p. 621; and *De Cordova* v. *De Cordova* (1879) L. R. 4 App. Ca., at p. 703. Such a compromise should never be entered into without the sanction of the Court (*Re Houghton*, *ubi sup.*, at p. 626).]

(d) *Re Fish* [1893] 2 Ch. 413.

Appropriation to meet legacies

2207. A personal representative can, with the consent of a legatee who is under no disability, and whose legacy is vested, appropriate a specific portion of the testator's estate in payment of the legacy;[a] and such an appropriation cannot be questioned by the other beneficiaries, even though the estate is subsequently reduced in value, if, at the time when it was made, it was a fair and honest arrangement.[b] Any profit or loss upon a fund so appropriated belongs to or is borne by the legatee.[c]

(a) *Re Lepine* [1892] 1 Ch. 210.
(b) *Ibid.*, at pp. 216, 218.
Re Brookes [1914] 1 Ch. 558 (trustees).
(c) *Re Hall* [1903] 2 Ch., at p. 231.

Legacies not immediately payable

2208. If the legatee of a vested legacy cannot be found or is under disability, or if a legacy is settled upon successive trusts, the personal representative can appropriate and invest a sum of money to answer the legacy.[a] The representative will then be under no further personal liability in respect of the legacy; but, unless the sum was appropriated under an order of the Court, the residuary estate is not freed from liability if the sum appropriated proves to be insufficient.[b]

(a) *Re Hall* [1903] 2 Ch., at p. 233, *per* Romer, L. J.

[Such investment must be one authorized by the testator or by law (*Re Beverley* [1901] 1 Ch. 681); unless the Court for special reasons should sanction an unauthorized investment (*Re Cooke* [1913] 2 Ch. 661).]

(b) *Re Salaman* [1907] 2 Ch., at p. 50 (reversed on another point).

Contingent legacies

2209. The rule stated in § 2208 applies also to a contingent legacy, if either no provision is made for the application of the intervening interest on the legacy, or some or all of such income is, pending the contingency, to go to the legatee.[a] But in such a case, pending the contingency, either the fund so appropriated and the interest thereon, or the fund without the interest which has been paid to the legatee, forms part of the estate of the deceased.[b]

(a) *Re Hall* [1903] 2 Ch., at p. 233, *per* Romer, L. J.
(b) *Ibid.*, at pp. 233–4.

[Therefore, contrary to the rule which applies when the testator has himself directed the legacy to be set apart (*Re Woodin* [1895] 2 Ch., at pp. 314, 315), the legatee, even on fulfilment of the contingency, will not be entitled to the intervening income.]

Payment of legacies into Court

2210. Whenever there is a doubt as to the person entitled to receive a payment from the estate, and whenever any person entitled to receive a payment cannot give a valid discharge for such payment, the representative may pay the sum due into Court.[a] If he pays into Court where no reasonable doubt exists, merely in order to escape responsibility, he must bear the costs occasioned by his act.[b]

(a) *Re Parker's Trusts* (1888) 58 L. J. Ch., at pp. 24–5.
(b) *Re Elliot's Trusts* (1873) L. R. 15 Eq. 194.

Survival of powers

2211. The provisions of Bk. III, Sect. XVII, Tit. IV, § 1810, apply to co-representatives;[a] unless it is

clear that a testator intended to give powers only to the persons named in their individual capacity, and not to them or any one who might succeed them in the office of his representative.[b]

(a) Trustee Act, 1893, s. 22.
Conveyancing Act, 1911, s. 8.
(b) *Re Smith* [1904] 1 Ch., at p. 144.

TITLE VIII — PERSONAL RIGHTS AND LIABILITIES OF THE REPRESENTATIVE

Personal responsibility to strangers

2212. The representative is personally liable, irrespective of assets, to strangers for any wrongful acts done[a] or contracts made by him[b] in the course of the administration of the estate.

(a) *Re Raybould* [1900] 1 Ch. 199.
(b) *Labouchere* v. *Tupper* (1857) 11 Moo. P. C., at p. 221.
Farhall v. *Farhall* (1871) L. R. 7 Ch. App., at p. 128.
Watling v. *Lewis* [1911] 1 Ch. 414.

[The last case shews that even an express attempt to negative such liability by a clause in the contract will be ineffectual.]

Indemnity of representative

2213. When acts are done or contracts are entered into by a representative in the regular pursuance of powers given by law to him, he is entitled to be indemnified in respect of his liability thereby incurred, out of the assets, in priority to the creditors and beneficiaries of the deceased;[a] and this right of indemnity exists notwithstanding that the estate is insolvent.[b]

(a) *Benett* v. *Wyndham* (1862) 4 De G. F. & J. 259 (trustee).
Sharp v. *Lush* (1879) 10 Ch. D., at p. 472 (funeral expenses).
Stott v. *Milne* (1884) 25 Ch. D., at p. 715, *per* Lord Selborne, C. (costs).
Re Raybould, ubi sup.
(b) Bankruptcy Act, 1914, s. 33 (5), 130 (6).

[The authorities usually speak only of funeral and testamentary expenses; but it is difficult to see why the same principle should not apply to liability incurred by other acts similarly authorized — e. g. acts properly done in the course of carrying on the deceased's business for the purpose of winding it up (*Dowse* v. *Gorton* [1891] A. C., at p. 203, *per* Lord Macnaghten). In fact this extension appears to be implied by *Re Raybould*, *ubi sup.*]

Limited indemnity

2214. If the representative does acts[a] or enters into contracts[b] in the regular pursuance of a power conferred upon him by the testator, he is entitled (as against the beneficiaries) to be indemnified against liability arising therefrom, out of any assets allowed by the testator to be employed in the execution of such power.[c]

(a) *Re Raybould* [1900] 1 Ch. 199.
(b) *Ex parte Garland* (1804) 10 Ves., at p. 120.
Re Johnson (1880 15 Ch. D. 548.
Re Evans (1887) 34 Ch. D. 597.
(c) *Ex parte Garland* (1804) 10 Ves. 110.

[In *O'Neill* v. *McGrorty* [1915] 1 Ir. R. 1, it was held that where no specific fund had been set apart by the testator, a receiver and manager appointed by the Court to carry on the testator's business had a right to resort to the general estate, including such parts of it as had been carried to the separate credits of legatees.]

Restrictions on indemnity

2215. The representative's right of indemnity under § 2214 is subject to (i) the claims of all the creditors of the deceased who cannot be proved to have assented expressly or by their conduct to the exercise of the power;[a] (ii) the rights of all legatees who have actually been paid;[b] and (iii) all

claims by creditors or beneficiaries against the representative, in respect of any failure to administer the estate properly.[c]

(a) *Dowse* v. *Gorton* [1891] A. C. 190.
Hodges v. *Hodges* [1899] 1 Ir. Rep. 480.
Re Oxley [1914] 1 Ch. 604.

[The last case shows that mere standing by is not an implied consent by creditors for this purpose.]

(b) *Ex parte Garland* (1804) 10 Ves., at p. 120.
(c) *Re Johnson* (1880) 15 Ch. D., at pp. 552–553.

[The fact that one of several representatives is in default will not prejudice the claim to indemnity of the other or others not in default (*Re Frith* [1902] 1 Ch. 342).]

Subrogation of creditors

2216. When the representative has a right of indemnity under §§ 2213 and 2214, his creditors in respect of the transactions which give rise to the indemnity may stand in his place, and enforce their claims against the assets to the extent to which the representative is entitled to be indemnified.

Re Johnson (1880) 15 Ch. D. 548.
Re Raybould [1900] 1 Ch. 199.

[A representative who trades with the assets without authority is of course guilty of a breach of trust. Any profit which he makes belongs to the estate (*Vyse* v. *Foster* (1874) L. R. 7 H. L., at p. 329); and the creditors of the testator have a claim to be paid out of the assets prior to that of the creditors of the representative (*Re Millard* (1895) 72 L. T. 823; *Re Oxley*, *ubi sup.*). If, however, the creditors of the testator have expressly assented to this breach of trust, they are regarded as the principals of the representative, and, as such, are obliged to indemnify him (*Dowse* v. *Gorton*, *ubi sup.*, at p. 208, *per* Lord Macnaghten; *Re Millard*, *ubi sup.*, at p. 827, *per* Lord Esher, *diss.*).]

Promise by representative

2217. The representative may by his own promise render himself personally liable to satisfy any of the liabilities to which the estate of the deceased is subject. Such a promise must satisfy all the requirements of a valid contract;[a] and it is not enforceable unless it also complies with the provisions of Bk. II, Part I, Sect. I, Tit. II, § 220.[b]

(a) *Rann* v. *Hughes* (1778) 7 T. R. 350.
(b) Statute of Frauds (1677) s. 4.

[But such a promise, if made by one who is not yet a representative, need not comply with the provisions of the statute (*Tomlinson* v. *Gill* (1756) Amb. 330).]

Personal liability on admission of assets

2218. The representative is personally liable, irrespective of assets, to pay any debt in respect of which judgment *de bonis testatoris* has been recovered against him;[a] and to pay debts or legacies if by his words[b] or conduct[c] he admits that he has received assets sufficient to pay them. An admission cannot be withdrawn unless it is clearly proved to have been made by mistake;[d] but if, after an admission, new facts as to the financial condition of the estate come to light, the admission made in ignorance of those facts is not binding.[e]

(a) *Re Marvin* [1905] 2 Ch. 490.

[Failure to plead *plene administravit* is, in fact, treated as an admission of assets.]

(b) *Rothwell* v. *Rothwell* (1825) 2 S. & St., at p. 218, *per* Leach, V. C. E.
Barnard v. *Pumfrett* (1841) 5 My. & Cr. 63.

(c) *Corporation of Clergy* v. *Swainson* (1747) 1 Ves. Sen. 75 (payment of interest on legacies).
Barnard v. *Pumfrett*, *ubi sup.* (part payment of legacies).
Re Brogden (1888) 38 Ch. D., at p. 569, *per* Cotton, L. J. (payment of interest on legacies).

[An admission by the representative that he has assets for the payment of a debt of a lower degree was formerly an admission that he had assets for the payment of a debt of a higher degree (*Payne* v. *Little* (1856) 22 Beav., at p. 70); but, since the passing of the Administration of Estates Act, 1869, this rule has diminished in importance. If a legatee has recovered judgment against a representative *de bonis propriis* on an admission of assets, and the judgment has been satisfied, a creditor can follow the assets paid over to the legatee, provided that the legatee has in fact been paid from the assets, and not from the property of the representative (*Re Brogden* (1888) 38 Ch. D., at p. 569, *per* Cotton, L. J.).]

(d) *Drewry* v. *Thacker* (1819) 3 Swanst., at p. 548, *per* Lord Eldon, L. C.
(e) *Horsley* v. *Chaloner* (1750) 2 Ves. Sen., at p. 85, *per* Strange, M. R. *Payne* v. *Little* (1856) 22 Beav. 69.

Payment an admission of assets

2219. Payment of one debt is, *primâ facie*, an admission that the assets are sufficient to pay all debts of a superior degree;[a] and payment of one pecuniary legacy is, *primâ facie*, an admission that the assets are sufficient to pay all pecuniary legacies.[b] But the circumstances under which such payments were made may negative this rule.[c]

(a) *Cadbury* v. *Smith* (1869) L. R. 9 Eq., at pp. 41–42.

[It is, of course, no admission of assets to pay other debts of equal degree; because the representative has a right to prefer one debt to another of equal degree (*ante*, Tit. V, § 2165).]

(b) *Cook* v. *Martyn* (1737) 2 Atk., at p. 3, *per* Lord Hardwicke, C.

[*Semble*, the inference would not arise from payment of a preferred legacy (*ante*, Sect. I, Tit. IV, § 2002).]

(c) *Postlethwaite* v. *Mounsey* (1842) 6 Ha. 33 n.
Cadbury v. *Smith* (1869) L. R. 9 Eq. 37.

Devastavit

2220. A representative is personally liable, irrespective of assets, to the party damaged to make good the loss if:—

(i) he breaks any of the rules as to the conduct of the administration of the estate;

Norman v. *Baldry* (1834) 6 Sim. 621 (payment to a legatee, a debt being outstanding).
Midgley v. *Midgley* [1893] 3 Ch. 282 (payment of a claim which was not enforceable).
Re Stevens [1898] 1 Ch., at pp. 168–9, *per* Lindley, M. R.

(ii) a loss is caused to the estate either by his misfeasance or by the neglect of his duties;

Hall v. *Hallet* (1784) 1 Cox, C. C. 134 (allowing interest-bearing debts to run on when he had in hand enough to pay them).
Tebbs v. *Carpenter* (1816) 1 Madd. 290 (neglect to recover arrears of rent).

[Delay in taking out probate does not amount to a devastavit (*Re Stevens*, *ubi sup.*).]

(iii) having got possession of the assets, he loses them by his wilful default.

Job v. *Job* (1877) 6 Ch. D. 562.

[At common law, the representative was absolutely responsible for any assets which came to his hands. But this was never the rule in equity; and the equitable rule now prevails in all Courts (*Job* v. *Job*, *ubi sup.*). The remedy of the injured party is either

an action for administration and an account, or a personal action against the representative alleging a *devastavit* (*Re Stevens*, *ubi sup.*).]

Barred after six years

2221. An action for damages in respect of a devastavit against a personal representative is barred at the expiry of six years from the happening of the act or default alleged as the cause of action;[a] and, in an action against a personal representative to recover money honestly but mistakenly paid away by him as such representative, the defendant can plead the provisions of the Trustee Act, 1888, s. 8 (1) (b), whether the action is by a creditor or by a beneficiary, and whether it is in form an action to recover money or an action for administration.[b]

(a) *Thorne* v. *Kerr* (1855) 2 K. & J. 54.
Lacons v. *Warmoll* [1907] 2 K. B. 350.
(b) *Re Blow* [1914] 1 Ch. 233.

[For particulars of the statutory provision, see *ante*, Bk. III, Sect. XVII, Tit. VI, § 1823.]

No attachment on personal order

2222. A creditor who has obtained a personal order against a representative for payment *de bonis propriis* of a debt due from the deceased, cannot enforce it by an order for attachment of the representative, as a person acting in a fiduciary capacity in default under an order by a Court of Equity, under the provisions of Section 4 of the Debtors Act, 1869.

Re Thomas [1912] 2 Ch. 348.

[In respect of moneys ordered to be paid by the representative out of the deceased's assets which have come to his hands, the representative is in the position of a trustee, and can, therefore, be attached for disobedience to the order (Debtors Act, 1869, s. 4 (3); *Re Thomas*, *ubi sup.*). And, presumably, if the plaintiff can show means, the representative can, in other cases, be committed to prison for a limited period under the provisions of s. 5 of the Act.]

No liability for co-representative

2223. One representative cannot be made personally liable for the acts or defaults of a co-representative;

Trustee Act, 1893, ss. 24, 50.
Hargthorpe v. *Milforth* (1594) Cro. Eliz. 318.
Dix v. *Burford* (1854) 19 Beav., at p. 412.

unless:—

(i) he unnecessarily does an act by which his co-representative gets sole control of any of the assets; or

Skipbrook v. *Hinchinbrook* (1805) 11 Ves. 252.
Clough v. *Bond* (1838) 3 My. & Cr. 490.
Re Gasquoine [1894] 1 Ch. 470.

(ii) he negligently acquiesces in, or facilitates, a breach of duty by the co-representative.

Booth v. *Booth* (1838) 1 Beav. 125.
Styles v. *Guy* (1849) 1 M. & G. 422.

[*Semble*, there should, on principle, be a right of contribution among co-representatives who have become liable through a joint fault (*Dering* v. *E. of Winchelsea* (1787) 1 Cox, Eq. Cas., at p. 321, *per* Eyre, C. B.; *Robinson* v. *Harkin* [1896] 2 Ch. 415).]

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MIDDLE
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